84-762

Office-Supreme Court, U.S.
FILED
NOV 9 1984
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

AMOS E. REED, et al.,

Petitioners,

v.

CHARLES J. SLAKAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RUFUS L. EDMISTEN
Attorney General of
North Carolina

Jacob L. Safron
Special Deputy Attorney General

Lucien Capone III
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
Telephone: (919) 733-7188

ATTORNEYS FOR PETITIONER

DiCesare and Associates Printing • Washington, D.C. • (202) 331-8101

56 pp

QUESTION PRESENTED

WHETHER THE TWO HIGHEST RANKING STATE OFFICIALS RESPONSIBLE FOR AN 86 UNIT PRISON SYSTEM WITH OVER 15,000 INMATES AND 5,700 EMPLOYEES AND THE WARDEN OF THE STATES LARGEST PRISON CAN BE HELD PERSONALLY LIABLE FOR DAMAGES UNDER 42 U.S.C. §1983 FOR THE UNAUTHORIZED USE OF FORCE AGAINST A SINGLE INMATE BY TWO GUARDS ON THE SOLE THEORY THAT THOSE OFFICIALS FAILED TO PROVIDE ADEQUATE SUPERVISION OVER THEIR SUBORDINATES?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fourth Circuit whose judgment is sought to be reviewed are (1) Charles J. Slakan, an inmate in the custody of the North Carolina Department of Correction, (2) Amos E. Reed, former Secretary of the North Carolina Department of Correction, (3) Ralph Edwards, former Director of the Division of Prisons of the North Carolina Department of Correction and (4) Sam Garrison, former Warden of Central Prison of the North Carolina Division of Prisons.

TABLE OF CONTENTS

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING i
OPINIONS BELOW 1
JURISDICTION 2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2
STATEMENT OF THE CASE 3
REASONS FOR GRANTING THE WRIT 6
CONCLUSION 11
CERTIFICATE OF SERVICE 12
APPENDIX A-1

TABLE OF AUTHORITIES

CASES

Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984) 8

Beishir v. Swenson, 331 F. Supp. 1227 (W.D. Mo. 1971) 8

Clemmons v. Greggs, 509 F.2d 1338 (5th Cir. 1975) 8

Hawkins v. Elliott, 385 F. Supp. 354 (D.S.C. 1974) 8

Martinez v. California, 444 U.S. 277, 285 (1980) 10

Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978) 6, 9, 10

Peterson v. Davis, 551 F. Supp. 137 (D. Md. 1982) 8

Rizzo v. Goode, 423 U.S. 362 (1976) 6, 8, 9, 10

Ross v. Reed, 719 F.2d 689 (4th Cir. 1983) 10

Slakan v. Porter, 737 F.2d 368, 376 (4th Cir. 1984) 6, 7, 9

Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979) 8

CONSTITUTIONAL PROVISIONS

Eighth Amendment, U.S. Constitution 2

Fourteenth Amendment, U.S. Constitution 2

STATUTES INVOLVED

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 ..... i, 2, 3, 6, 10

Rule 54(b), F.R.C.P. 6

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

AMOS E. REED, et al.,

Petitioners,

v.

CHARLES J. SLAKAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners, Amos E. Reed, Ralph Edwards and Sam Garrison pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit filed June 5, 1984, and Order denying the Petition for Rehearing filed August 13, 1984.

OPINIONS BELOW

The Opinion of the United States Court for the Fourth Circuit filed on June 5, 1984 is published at 737 F.2d 368 (4th Cir. 1984). A copy is included in the Appendix. The Opinion of that Court denying the

Petition for Rehearing filed on August 13, 1984 is unpublished and is also printed in the Appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Eighth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983.

U.S. Const. Amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. XIV, §1 provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the

jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

STATEMENT OF THE CASE

This is a civil rights action filed under 42 U.S.C. §1983 by Respondent, Charles J. Slakan, a North Carolina State Court inmate, seeking damages for an alleged excessive use of force against him on August 3, 1979 at North Carolina Central Prison in Raleigh, North Carolina. The defendants were three guards, T.C. Porter, M.M. Walters and J. Barefoot; the former Warden of Central Prison, Sam Garrison, the former Director of the Division of Prisons, Ralph Edwards; and the former Secretary of Correction, Amos Reed.

A jury trial began on May 31, 1983 and lasted four days. The evidence tended to show that on the morning of August 3, 1979 Slakan was an inmate assigned to the intensive management cell-block at Central Prison due to his past history of assaultive prison behavior. A disruption began on the block when Respondent hollered to various inmates in order to wake them up so that they would not miss the coffee as it was being served. The defendant guards attempted to resolve the situation by talking to Slakan but were met with insults. Slakan testified that he reached through the cell bars and "touched" defendant Walters whereupon Walters accused Slakan of trying to slap him and threw a cup of coffee at Slakan. Slakan then called Walters "some bad names".

When Slakan refused to quiet down or be handcuffed and removed from his cell the guards squirted or attempted to squirt him with two fire hoses. A small amount of tear gas was also sprayed into the cell by Walters.

The guards then entered the cell and struck Slakan several times with night sticks when he allegedly attacked them. Walters and Porter admitted hitting Slakan a total of four times on the head to stop his attack. He was then taken to the first aid room and received a total of 61 stitches for 4 cuts on his head. Slakan also testified that he had several bruises, blisters and a burst capillary in his eye. However, the medical records contained no evidence of any injuries other than the four head wounds.

Slakan did not allege that petitioners Reed, Edwards, or Garrison were present or physically involved in this incident. Rather, it was alleged that these officials were responsible for failing to exercise adequate supervision over their subordinates in the use of force on cell-confined inmates. Slakan offered evidence of nine prior incidents of the use of fire hoses and mace against cell-confined inmates during the preceeding 4 years at Central Prison. None of these incidents involved the use of batons and only one involved any evidence of injury (that being limited to bruises). Also, none of these incidents had ever been the subject of court action. One incident, which occurred in 1975, was the subject of a North Carolina Inmate Grievance Commission report which recommended against the use of fire hoses against inmates locked in cells "unless there is an imminent threat of physical danger of another person *or* with the direct approval of the Warden, Deputy Warden or Shift Supervisor," That recommendation was rejected by

then Secretary of Correction, David Jones who was Petitioner Reed's predecessor in office.[1]

Petitioner Garrison admitted knowledge of these prior incidents but presented evidence to show that he had taken steps before August 3, 1979 to implement training on use of force policies and had directed that the fire hose be used only with the permission of the officer in charge. See Appendix.

Petitioner Edwards testified that he was not aware of the specific incidents offered by Slakan, but was aware that the fire hose could be used if warranted.[2]

There was no evidence presented to show that Petitioner Reed was aware of any of these incidents. Reed did admit in his Answer that he had "approved the use of physical force including fire hoses and tear gas under appropriate circumstances and that these appropriate circumstances include some situations in which inmates may be confined to their cells." However, that admission was not read to the jury.

---

[1]Reed did not become Secretary until January 1977.

[2]The Court of Appeals erroneously stated in its Opinion that Edwards had admitted specific knowledge about the seven incidents that preceeded Respondent's case. *Id.* at 374. However, his actual testimony was as follows,

Q. During those years ['73 to '81] were you aware that the high pressure fire hose was being used against inmates confined in a cell?

A. I knew that fire hoses were used, yes.

Q Against inmates confined in a cell?

A. I am not sure that a specific - *I am not sure of whether a specific incident report came across my desk of an inmate being confined in a cell or not.* But I was aware that there was nothing that prohibited it if the situation warranted it. (Emphasis added)

The jury returned a verdict against all of the defendants except one guard, J. Barefoot.[3] It awarded Slakan $2500.00 in compensatory damages and $30,000.00 in punitive damages. The District Court entered final judgment pursuant to Rule 54(b), F.R.C.P. on June 3, 1984.

Petitioners appealed to the United States Court of Appeals for the Fourth Circuit. That Court affirmed in an opinion filed on June 5, 1984. The Court of Appeals subsequently rejected Petitioners' Petition For A Rehearing on August 13, 1984.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS NEGATES THE REQUIREMENT OF PERSONAL INVOLVEMENT AS A PREDICATE TO LIABILITY UNDER 42 U.S.C. §1983.

Rizzo v. Goode, 423 U.S. 362 (1976), and *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) firmly established the principle that a supervisory official cannot be held liable under 42 U.S.C. §1983 solely because he has employed a tort-feasor. Rather, there must be evidence of personal involvement by the supervisor in the misconduct of his subordinate, i.e., there must be an "affirmative link" between the misconduct and the adoption of a plan or policy by the supervisor showing his authorization or approval of such misconduct. *Rizzo v. Goode, supra* at 371. For example, in *Monell* this Court held that the requisite nexus between policy and injury was shown where city employees had acted pursuant to a

---

[3]The opinion of the Court of Appeals erroneously states that T.C. Porter was the exception rather than Barefoot. *Slakan v. Porter*, 737 F.2d 368, 372 (4th Cir. 1984)

municipal policy which was unconstitutional on its face in compelling pregnant employees to take unpaid leaves of absence before such leaves were required for medical reasons.

In this case the only evidence presented by Slakan to establish such a link was that of the eight prior use of force incidents and the 1975 Inmate Grievance Commission recommendation. Slakan's theory, adopted by the Court of Appeals, was that these incidents revealed a pattern of indiscriminate use of force against cell-confined inmates which went unchecked, resulting in the excessive use of force against him on August 3, 1979. The Court of Appeals stated in its Opinion that,

> The evidence conclusively established that, despite the obviousness of the danger and the ease with which it could have been abated, the supervisors failed to act. They provided little or no direction to their subordinates concerning the appropriateness of the water hosing practice or the safeguards that should be followed to protect the inmate from excessive force and injury. Critical decisions relating to permissable water pressure levels, exposure periods, and the circumstances justifying its use against securely confined inmates were all left to the guards' unbridled discretion. This adminsitrative policy, or more accurately lack of policy, invited abuses of the kind experienced by Slakan.
>
> *Slakan v. Porter*, 737 F.2d 368, 376 (4th Cir. 1984).

Yet, this very line of reasoning had previously been

rejected in *Rizzo.* Plaintiffs in that case brought suit against several Philadelphia officials seeking to hold them responsible for various incidents of police misconduct. They argued that even in the absence of evidence showing that the officials were directly responsible for the misconduct the officials' failure to act in the face of a statistical pattern of abuse was sufficient to establish liability. This Court responded that,

> Such reasoning, however, blurs accepted usage and meanings in the English language in a way which would be quite inconsistent with the words Congress chose in §1983. We have never subscribed to these amorphous propositions and we decline to do so now.
>
> *Id.* at 375-76.

Petitioners submit that, just as in *Rizzo,* the mere existence of prior use of force incidents, even if they could be characterized as a "pattern of misconduct," are not sufficient to establish a nexus between Slakan's injuries and the adoption of a plan or policy by Petitioners showing their authorization or approval of such misconduct. Although Petitioners had approved the use of water hoses and other force against cell-confined inmates where necessary, that fact does not show approval, express or otherwise of the *excessive* use of force. There is no *per se* prohibition of the use of water hoses, tear gas and the like against cell-confined inmates as several courts have recognized. *See, e.g., Bailey v. Turner,* 736 F.2d 963 (4th Cir. 1984); *Spain v. Procunier,* 600 F.2d 189 (9th Cir. 1979); *Clemmons v. Greggs,* 509 F.2d 1338 (5th Cir. 1975); *Peterson v. Davis,* 551 F. Supp. 137 (D. Md. 1982); *Hawkins v. Elliott,* 385 F. Supp. 354 (D.S.C. 1974); *Beishir v. Swenson,* 331 F. Supp. 1227 (W.D.

Mo. 1971). And, as noted above, none of the prior incidents had been found excessive in any court.[4]

On the other hand, the uncontradicted evidence (offered by Slakan himself) showed that the Petitioners had adopted written policies mandating that physical force should be used only in limited circumstances after other methods had failed, (to prevent escape, to prevent injury to staff, citizenry or inmates, or to prevent damage to property), and only in that amount which appears reasonably necessary. See Appendix.

However, the thrust of the decision below was that Petitioners should have known that their use of force policies were inadequate based on the prior incidents such that Respondent's injuries were a "natural and foreseeable consequence of the supervisors' indifference." *Slakan v. Porter, supra* at 376. Not only does this reasoning fail under *Rizzo* and *Monell* but it fails under the undisputed fact that *not one of the prior incidents offered by Slakan involved the use of riot batons* - the instrument that caused the only real injuries in this case i.e., four cuts to the head. Further, only one of the prior incidents involving use of the fire hose resulted in any injury, and that was limited to bruises. Nevertheless, the decision of the Court of Appeals effectively requires that the two highest ranking officials of the State Prison system encompassing 86 prisons, 15,000 inmates and 5,700 employees as well as the Warden of the State's largest prison to have predicted what occurred in Respondent's case based on the prior, clearly dissimilar incidents.[5]

---

[4]One subsequent incident was adjudicated in petitioners' favor.

[5]The inmate population at Central Prison was nearly 1,500 at the time of the Slakan incident.

Petitioners submit that the effect of such a holding is to negate the *Rizzo* and *Monell* requirement that there be evidence of an affirmative link between a subordinate's misconduct and the adoption of a plan or policy showing that the supervisors authorized such misconduct.

The implications for future cases against high ranking supervisory officials in all areas of State government are alarming and clear. The failure to predict the excesses of employees far removed from the officials' level of immediate supervision is likely to result in personal liability for compensatory and punitive damages under 42 U.S.C. §1983 if it can be said from the vantage of hindsight that the injury was foreseeble. This stretches beyond the breaking point the clear requirement of the statute that there be personal involvement in the deprivation of another's constitutional rights in order for liability to attach. Both this court and the Fourth Circuit Court of Appeals have recognized that, while high ranking officials can be held liable under §1983 if they violate another's rights, there comes a point when their conduct is simply too remote in legal contemplation to have that effect. *Martinez v. California,* 444 U.S. 277, 285 (1980); *Ross v. Reed,* 719 F.2d 689 (4th Cir. 1983). That point was passed in this case.

CONCLUSION

For the reasons stated above the Petition for a Writ of Certiorari should be granted.

This is the 9th day of November 1984.

Respectfully submitted.

RUFUS L. EDMISTEN
Attorney General

Jacob L. Safron
Special Deputy Attorney General

Lucien Capone III
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-7188

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the foregoing Petition for Certiorari has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

Charles T.L. Anderson
N.C. Prisoner Legal Services
6th Floor Capital Club Building
16 W. Martin Street
Raleigh, North Carolina 27611

This is the 9th day of November, 1984

RUFUS L. EDMISTEN
Attorney General

_____

Jacob L. Safron
Special Deputy Attorney General

_____

Lucien Capone III
Assistant Attorney General

APPENDIX

APPENDIX

1. Opinion of the Court of Appeals A-1
2. Opinion of the Court of Appeals on Rehearing . A-26
3. Regulations and Policy Statements on the Use of Force A-38

Charles J. SLAKAN, Appellee,
v.
T.C. PORTER, M.M. Walters, Amos Reed, Ralph Edwards, Sam Garrison, Appellants.

and

J.B. Barefoot, J.G. Watson, D.R. Woodward, Jack Lemons, Defendants.

No. 83-6542.

United States Court of Appeals,
Fourth Circuit.

Argued Feb. 10, 1984.

Decided June 5, 1984.

Inmate who was injured when prison guards used high-pressure water hoses, tear gas and billy clubs to subdue him while he was confined in a one-man cell brought section 1983 suit against three guards and three high-ranking prison supervisory officials, alleging that guards used excessive force in violation of Eighth Amendment and that supervisory officials were deliberately indifferent to a known risk of harm. The United States District Court for the Eastern District of North Carolina, Alexander Denson, Magistrate, entered judgment in favor of prisoner in the amount of $32,500, and defendants appealed. The Court of Appeals, Sprouse, Circuit Judge, held that: (1) prison guards' heavy-handed use of water hoses, billy clubs, and tear gas against prisoner crossed line separating necessary force from brutality; (2) evidence was sufficient to establish supervisory liability of warden, Director of Prisons, and Secretary of Correction; (3) supervisory officials were not entitled to qualified immunity from money damages,

since they had explicit legal guideposts to follow when discharging their duties and were or should have been aware of firmly established duty to ensure that legitimate instruments of control were not misused; (4) trial court committed harmless error in relying on North Carolina law for its ruling that conversations between prisoner and his psychologist were privileged and could not be disclosed; (5) trial court acted within bounds of its discretion in permitting jury to view videotape depicting force unleashed by high-pressure water hoses and (6) correction expert's opinions concerning punitive nature of North Carolina's water hosing practices were property admitted.

Affirmed.

1. Civil Rights

Unjustified striking or beating of prisoner by police or correctional officials constitutes cruel and unusual punishment" which is actionable under section 1983. 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

2. Prisons

High-pressure water hoses, tear gas, and billy clubs, though legitimate forms of control in certain circumstances, become instruments of brutality when used indiscriminately against a defenseless prisoner.

3. Prisons

Even when a prisoner's conduct warrants some form of response, norms of decency require prison officials to use techniques and procedures that are both humane and restrained.

4. Civil Rights

Although prisoner's abusive language as he complained about missing morning cup of coffee may have deserved punishment through prison disciplinary machinery, it did not justify subjecting him to steady blasts of water from two high-pressure hoses, tear gas, and beating him savagely around the head and body with billy clubs, and thus guards' conduct crossed line separating necessary force from brutality and indisputably deprived prisoner of a right secured by the Constitution and laws of the United States. U.S.C.A. Const. Amend. 8.

5. Civil Rights

Supervisory officials may be held liable in certain circumstances for constitutional injuries inflicted by their subordinates; liability in such context is not premised on respondeat superior, but on recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in constitutional injuries they inflict on those committed to their care.

6. Civil Rights

Prisoner assumes a heavy burden of proof in supervisory liability cases, since he not only must demonstrate that prisoners face a pervasive and unreasonable risk of harm from some specified source, but he must show that supervisor's inaction amounts to deliberate indifference or tacit authorization of offensive practices.

7. Civil Rights

Prisoner who brings supervisory liability suit cannot satisfy his burden by pointing to a single incident or isolated incidents, for a supervisor cannot be

expected to promulgate rules and procedures converting every conceivable occurrence within area of his responsibilities; nor can he reasonably be expected to guard against deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate misconduct; however, a supervisor's continued inaction in face of documented widespread abuses provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates.

8. Civil Rights

Supervisory liability in civil rights context may extend to highest levels of state government; outer limits of liability in any given case are determined ultimately be pinpointing persons in decision-making chain whose deliberate indifference permitted constitutional abuses to continue unchecked; final determination generally is one of fact, not law, but state statutes fixing administrator's legal duties provide a useful guide in determining who had responsibility and capability to end offensive practices.

9. Civil Rights

Although conduct of supervisory officials may be fairly characterized as a breach of their legal and constitutional duties, they are not liable in a civil rights context unless an affirmative causal link exists between their inaction and harm suffered by plaintiff.

10. Civil Rights

Warden, Director of Prisons, and Secretary of Corrections were liable as supervisors for injuries suffered by prisoner in a one-man cell who was subjected to water blasts from high-pressure hoses,

where evidence established that supervisors all had varying degrees of knowledge about excessive and unregulated use of water hoses against unarmed, securely confined inmates in prison, they were aware of their special statutory and constitional responsibilities to protect inmates against inhumane treatment, they knew that water blasts from a high-pressure hose would have probably inflicted injuries of unpredictable severity on prisoners, but they failed to act and provided little or no direction to their subordinates concerning appropriateness of water hosing practice of safeguards that should be followed to protect inmate from excessive force and injury.

11. Civil Rights

Warden, Director of Prisons, and Secretary of Corrections were not entitled to qualified immunity from money damages awarded prisoner who was subjected to water hosing, tear gas and beating, since officials had explicit legal guideposts to follow in discharging their duties, and they were or should have been aware of their firmly established duty to ensure that legitimate instruments of control were not misused; moreover, whether or not officials were actually aware of their constitutional and statutory obligations, they were presumed to know what the law required, and could be legally accountable for conduct that violated fixed standards.

12. Federal Courts

Federal Rule of Evidence requires federal courts to determine testimonial privileges in accordance with federal common law, except in cases in which law of the state supplies rule of decision. Fed. Rules Evid. Rule 501, 28 U.S.C.A.

13. Federal Courts

Trial court inaction by prisoner alleging he was deprived of his civil rights by water hosing and beating admnistered by guards erred in relying on North Carolina law for its ruling that conversations between prisoner and his psychologist were privileged and could not be disclosed; however error was harmless since prison officials proffered the evidence to prove that prisoner accepted partial responsibility for provoking guard's attack and evidence was merely cumulative of other testimony and did not prejudice their attempt to present a provocation defense to jury.

14. Evidence

Inaction by prisoner for injuries suffered when prison guards used high-pressure water hoses, tear gas and billy clubs to subdue him while he was confined in one-man cell, trial court acted well within bounds of discretion in permitting jury to view videotape depicting force unleashed by hose squirting water under 55 pounds of pressure, since water pressure and hose nozzle used against prisoner were the same as those depicted in videotape documentation, tape was shown in conjunction with expert testimoney of fireman who was fully qualified to discuss force generated by high-pressure water hoses, and thus videotape accurately and fairly depicted force applied against prisoner.

15. Evidence

Federal Rules of Evidence permit trial court wide discretion in admitting expert testimony bearing on ultimate issues in the case. Fed. Rules Evid. Rules 702, 704, 28 U.S.C.A.

16. Evidence

Inaction by prisoner to recover for injuries he sustained when prison guards used high-pressure water hoses, tear gas, and billy clubs to subdue him while he was confined in a one-man cell, trial court did not abuse its discretion in admitting correction expert's opinions concerning punitive nature of North Carolina's water hosing practices.

Lucien Capone, III, Asst. Atty. Gen., Raleigh, N.C. (Rufus L. Edmisten, Atty. Gen.., Raleigh, N.C., on brief), for appellants.

Charles T.L. Anderson, Apex, N.C. (Richard E. Giroux, North Carolina Prisoner Legal Services, Inc., Raleigh, N.C., on brief), for appellee.

Before SPROUSE and CHAPMAN, Circuit Judges, and PECK, Senior Circuit Judge.*

SPROUSE, Circuit Judge:

Charles J. Slakan, a North Carolina inmate, was injured when prison guards Michael Walters, Tracy Porter, and Johnny Barefoot used high-pressure water hoses, tear gas, and billy clubs to subdue him while he was confined in a one-man cell. He brought a 42 U.S.C. § 1983 suit against the three guards and three high ranking prison supervisory officials, Warden Sam Garrison, Director of Prisons Ralph Edwards and Secretary of Corrections Amos Reed, alleging (1) that the guards used excessive force against him in violation of the eighth amendment's cruel and unusual punishment clause and (2) that

*Hon. John W. Peck, Senior Circuit Judge, Sixth Circuit, sitting by designation.

supervisory officials were deliberately indifferent to a known risk of harm, as evidenced by their failure to provide prison guards with adequate training and guidance. The jury absolved prison guard Porter of liability, but awarded Slakan $32,500 in combined compensatory and punitive damages against the remaining five defendants. We affirm.

I

Slakan was housed in a one-man cell at Central Prison in Raleigh, North Carolina, during the episode involved in this appeal. Walter, Porter, and Barefoot were prison guards assigned to the intensive management section of the Raleigh facility where Slakan was confined. Garrison was the Central Prison Warden and Edwards and Reed served as North Carolina's Director of Prisons and Secretary of Corrections, respectively.

On the morning of August 3, 1979, Slakan awakened to discover that he and many of his fellow inmates had missed receiving their usual morning cup of coffee. He complained loudly and finally drew the attention of Walters, the acting lieutenant in charge of cell-blocks, A, B, C and D. Walters brusquely rejected Slakan's complaint and began walking away from the cell when the inmate reached through the bars of his door and slapped the lieutenant on the shoulder. The parties vigorously dispute the amount of force Slakan used to impede the guard's movement. Walters spun around upon receiving the blow and flung a cup of coffee he was holding in Slakan's direction, striking the prisoner in the face and shoulder. Enraged, Slakan spewed obscenities at Walters, who immediately called for a water hose to quell the one-man disturbance. The hose was brought to the cell door and a blast of water

was directed at Slakan's head and neck. The inmate panicked and hurled toilet paper, cleaning agents, and other small items within his reach toward Walters. Another hose was ordered and a second blast of water was directed at Slakan's head and neck, forcing him against the back wall of his cell.

Meanwhile, tear gas was sprayed into the cell every several minutes, eventually rendering the prisoner powerless. Guards Walters, Barefoot, and Porter ceased their two-pronged attack against Slakan after five to ten minutes and entered his cell. One of the guards struck Slakan twice on the head and with a billy club causing him to fall into his bed. He then was beaten repeatedly on the head and body an indeterminate number of times until he apparently lost consciousness. Slakan eventually was removed from the cell and taken to the first aid room for treatment. He required sixty-nine stitches for the head wounds received during the attack, and reportedly suffered minor contusions and eye irritation from the water blasts and tear gas.

Slakan, acting *pro se*, filed suit against the guards involved in the episode, alleging that they had used excessive force in the conduct of their duties. He also named Warden Garrison, Director Edwards, and Secretary Reed as co-defendants, claiming that they either had been deliberately indifferent to the use of excessive force by guards or had tacitly authorized such practices through their regulations and policies. The district court appointed counsel to assist Slakan in the presentation of his case, and all parties consented to jury trial before a United States magistrate.

The trial began on May 31, 1983, and lasted four days. The evidence relating to the guard's excessive use of force in subduing Slakan was straightforward

and convincing. The evidence relating to the supervisory liability of Garrison, Edwards, and Reed, however, was much more indirect and involved. It showed that though none of the three men had given express approval for the use of force against Slakan, they were all aware of seven recent cases involving the use of high-pressure hoses against Central Prison inmates housed in one-man cells. The evidence further showed that Garrison and Edwards had disapproved of a gubernatorial committee's call for rules restricting the use of high pressure water hoses to situations in which the inmate posed a threat to himself or others. Slakan's case against Secretary Reed focused principally on his failure to enact regulations specifying when and under what circumstances high-pressure hoses, billy clubs, and tear gas might be used against a prisoner in a one-man cell.

The jury deliberated for a few hours and returned a verdict for the plaintiff against all defendants except Porter, one of the guards allegedly responsible for striking Slakan on the head. All five remaining defendants were ordered to pay $500 each in compensatory damages and sums ranging from $10,000 to $1,000 each in punitive damages, for a total award to Slakan of $32,500. On appeal, the various defendants seek reversal on the following grounds: (1) the evidence adduced at trial was insufficient to establish the supervisory liability of Garrison, Edwards or Reed; (2) in any event these officials enjoyed qualified immunity because they did not violate any of Slakan's established constitutional rights; (3) the video demonstration of the effects of a high-pressure water hose was prejudicial and should have been excluded; (4) the trial court erred by ruling that the plaintiff's conversations with his psychologist

immediately after the attack were privileged; and (5) the trial court erred by permitting an expert to testify about the punitive nature of North Carolina's practices concerning the use of water hoses against inmates.

II

[1-3] The unjustified striking or beating of a prisoner by police or correctional officials constitutes cruel and unusual punishment which is actionable under 42 U.S.C. § 1983 *Wellington v. Daniels,* 717 F.2d 932, 935 (4th cir. 1983); *King v. Blankenship, 636* F.2d 70, 72 (4th Cir. 1980). *See also Bruce v. Wade.* 537 F.2d 850 (5th Cir. 1976); *Johnson v. Glick 481* F.2d 1028 (2d Cir.) *cert. denied,* 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). Society's intolerance for such brutality is well-documented, but it rises to new levels when the instrument of harm, even when properly used, possesses inherently dangerous characteristics capable of causing serious and perhaps irreparable injury to the victim. High-pressure water hoses, tear gas, and billy clubs, though legitimate forms of control in certain circumstances, become instruments of brutality when used indiscriminately against a defenseless prisoner, *See, e.g., Spain v. Procunier,* 600 F.2d 189 (9th Cir. 1979). Even when a prisoner's conduct warrants some form of response, evolving norms of decency require prison officials to use techniques and procedures that are both humane and restrained.

[4] The prison guards' heavy-handed use of water hoses, billy clubs, and tear gas against Slakan unquestionably crossed the line separating necessary force from brutality. The prisoner was locked in a one-man cell at the time of the incident and posed no direct physical threat to other inmates or any of the guards.

His abusive language may have deserved punishment through the prison disciplinary machinery but it assuredly did not justify subjecting him to steady blasts of water from two high-pressure hoses or beating him savagely around the head and body with billy clubs. The guards' conduct indisputably deprived Slakan of a right secured by the Constitution and the laws of the United State. *Baker v. McCollan,* 443 U.S. 137, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979). Our principal focus, then, is determining whether the responsibility for that deprivation can be traced to the actions of the guards supervisors.

A

[5] The decisions of this Court have firmly established the principle that supervisory officials may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. *See Orpiano v. Johnson,* 632 F.2d 1096, 1101 (4th Cir. 1980), *cert denied,* 450 U.S. 929, 101 S.Ct. 1387, 67 L.Ed.2d 361 (1981). *See also Wellington,* 717 F.2d at 936; *Withers v. Levine* 615 F.2d 158 (4th Cir. 1980). Liability in this context is not premised on *respondeat superior, Monell v. Department of Social Services,* 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978), but on a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict on those committed to their care. *Orpiano,* 632 F.2d at 1101.

[6, 7] The plaintiff, of course, assumes a heavy burden of proof in supervisory liability cases. He not only must demonstrate that the prisoners face a pervasive and unreasonable risk of harm from some specified source, but he must show that the supervisor's corrective inaction amounts to deliberate

indifference or "tacit authorization of the offensive [practices]". *Orpiano,* 632 F.2d at 1101 (quoting *Withers v. Levine,* 615 F.2d 158, 161)(4th Cir. 1981). Ordinarily, he cannot satisfy his burden of proof by pointing to a single incident or isolated incidents, *Orpiano,* 632 F.2d at 1101, for a supervisor cannot be expected to promulgate rules and procedures covering every conceivable occurrence within the area of his responsibilities. Nor can he reasonably be expected to guard against the deliberate criminal acts of his properly trained employees when he has no basis upon which to anticipate the misconduct. A supervisor's continued inaction in the face of documented widespread abuses, however, provides an independent basis for finding he either was deliberately indifferent or acquiesced in the constitutionally offensive conduct of his subordinates. *Id. See also Wellington,* 717 F.2d at 936.

[8] Supervisory liability in the civil rights context may extend to the highest levels of state government. *See, e.g., Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). The outer limits of liability in any given case are determined ultimately by pinpointing the persons in the decisionmaking chain whose deliberate indifference permitted the constitutional abuses to continue unchecked. The final determination "generally is one of fact, not law," *Avery v. County of Burke,* 660 F.2d 111, 114 (4th Cir. 1981), but state statutes fixing the administrator's legal duties provide a useful guide in determining who had the responsibility and capability to end the offensive practices.

We are satisfied that the evidence offered by Slakan against Warden Garrison, Director Edwards, and Secretary Reed established the supervisory liability of these government officials. *cf. McElveen v. Hutto,* 725

F.2d 925 at 958 (4th Cir. 1984) (fact-finding by jury will be set aside only where evidence, viewed in light most favorable to prevailing party, is so clearly wrong that reasonable persons could not reach any other conclusion that the asserted by losing party on appeal). Garrison was responsible for the day-to-day operations of the Central Prison and for the training and conduct of the guards. He admitted at trial that he knew of and condoned the use of high-pressure water hoses against inmates housed in one-man cells on at least seven occasions in the twelve months preceding the attact upon Slakan.[1] He admitted, moreover, that on one occasion he had personally approved of the use of a high-pressure hose against an inmate who was handcuffed and confined in a cell by himself.

---

[1]In the months immediateldy preceding the Slakan incident, several inmates confined in one-man cells were sprayed with tear gas and hosed by Central Prison guards. Only one of the incidents involved an inmate posing a physicial threat to himself or guards.

Inmate Ingram complained about a prison guard's failure to provide him with a pork-free meal and slung his food tray at his cell door. Although he was secure in his cell and posed no threat to himself, guards or other inmates, he was subjected to the water blast from a high-pressure hose for several minutes. The Warden took no action against the guards involved.

Inmate Grogan reportly was acting strange late one night while the other prisoners were sleeping. He apparently threw his radio from his cell and used abusive language when a guard investigated. He was hosed for five minutes. The Warden approved of the use of force in the incident.

Inmate Shephouser was sprayed with tear gas and hosed for five minutes after he threw a light bulb and mirror from his cell. The mirror struck a guard in the chest, but did not cause an injury. The prisoner was not armed and posed no direct physical threat to himself, guards or other inmates. The Warden approved of the use of force.

Inmate Rice was confined in a one-man cell at Central Prison. On May 10, 1979, he twice threw unknown substances at passing inmates. He was warned by guards to cease and then sprayed with tear gas and high-pressure water hose. He was treated for injuries at the first aid station. The guards were exonerated of any wrongdoing by the Warden.

Slakan's case against Garrison was bolstered by the testimony of a non-defendant guard who reportedly took part in six hosings while at Central Prison. He indicated that the practice was widespread among the guards and seldom questioned by supervisors. He also noted that alternative intervention techniques training was given to guards dealing with mental patients, but not to those handling regular inmates. Evidence introduced at trial further showed that Garrison had opposed a gubernatorial commission recommendation in 1975 that would have strictly regulated the use of water hoses against inmates locked in one-man cells. The commission recommendation was an outgrowth of an incident in which a North Carolina inmate was subjected to the

---

Inmate Brower broke his food tray into pieces and began throwing them from his cell. He was sprayed with tear gas and later treated for eye irritation. The use of force was approved by the Warden.

Inmate Perry reportedly threw his food tray and cup of water at inmates serving his meal. He was sprayed with tear gas by prison guards to bring him under control. The use of force was approved by Warden.

Inmate ingram was involved in a second hosing incident weeks before the Slakan attack. He reportedly reached through the bars of his cell and attempted to cut a passing guard with a razar blade. He refused to surrender the blade and then was sprayed with mace and subjected to water blast of a high-pressure hose for several minutes.

Inmate Mitchell became abusive with guards while he was in the visitation center, and was taken back in handcuffs to his one-man cell in the intensive management section of the prison. Several minutes later, the guards reappeared at his cell door with a water hose and began spraying the still handcuffed prisoner. The hosing lasted for nearly twent-five or thirty minutes before the uproar of inmates witnessing the incident caused the guards to cease. Mitchell was treated by emergency room officials for his injuries. The Warden approved of the use of force against Mitchell.

high-pressure blast of a water hose for 25 to 30 minutes while he was securely confined in his cell. In sum, the prevalence of the hosing practice was well-known to Garrison, yet he failed to offer adequate guidance to his subordinates concerning the appropriate uses of such techniques when dealing with inmates securely confined.[2]

Director Edwards was responsible for the day-to-day operations of all prisons in the North Carolina system. One of his primary responsibilities was implementing policies governing the treatment of inmates. 5 N.C.ADMIN.CODE 2A. 0101. In his official capacity, Edwards became aware well before the Slakan incident that hoses and tear gas were routinely being used against inmates locked in their individual cells. He admitted specific knowledge about the seven incidents that immediately preceded the Slakan attack and indicated that he approved of the use of force in each case. He conceded that the practice created certain risks for the inmates yet testified that he never attempted to discover the magnitude of the risks as part of a plan to restrict or regulate the practice. He conceded, moreover, that he had opposed implementing the 1975 commission recommendation concerning the need for tighter controls on the use of high-pressure hoses against cell-confinded inmates. His own testimony also established that he had never issued orders placing restrictions on the use of hoses against inmates, despite his actual knowledge about the widespread reliance on the practice.

The case against Secretary Reed was equally

[2]Slakan introduced evidence indicating that the inmate population deeply resented the use of water hoses against individuals who were locked in their cells. In some instances, the use of water hoses actually triggered riotous behavior among those inmates forced to watch one of their own pinned against the wall of his cell by a continuous blast of water.

convincing. The State of North Carolina invests the Secretary of Corrections with the responsibility for the "control and custody of all prisoners serving sentence(s) in the . . . the prison system." N.C.Gen. Stat. § 148-4. Every state correctional facility is by statute placed under his "administrative control and direction." N.C. Gen. Stat. 148-36. In discharging his duties, the Secretary is empowered to "propose rules and regulations for the government of the State prison system, which shall become effective when approved by the Department of Correction."

N.C. Gen. Stat. § 148-11. The Secretary shoulders specific responsibility for classifying prison facilities and for developing programs "so as to permit the proper segregation and treatment of prisoners according to the nature of the offenses committed, the character and mental conditions of the prisoners, and such other factors as should be considered in providing an individualized system of discipline, care and correctional treatment" N.C.Gen.Stat. § 148-36.

Slakan's case against Secretary Reed focused on his failure to exercise his statutory powers in a manner calculated to end the indiscriminate use of high-pressure water hoses against inmates securely housed in one-man cells. In support of his case, Slakan introduced copies of the Department of Correction's regulations governing the use of force against prisoners. Those regulations state that "[p]hysical force, firearms, tear gas, mace and other weapons for crowd and individual control will be used only when necessary to prevent escape or injury to staff, citizenry, or inmates; or to prevent damage to property." 5 N.C.ADMIN.CODE 2f. 1501(a). They do not differentiate, however, between the application of force against a roaming inmate and one locked in his

one-man cell. Nor do they even mention the use of high-pressure water hoses against any segment of the prison population, much less provide proper guidance for their use against an individual securely segregated from the general prison population.

A correctional expert testifying on behalf of Slakan's claim detailed the shortcomings of the North Carolina regulations. He noted that the Secretary had failed to properly identify the circumstances justifying the use of tear gas against a prisoner and omitted any reference at all to the use of water hoses, thereby leaving the critical decisions as to the use of these inherently dangerous instrumentalities solely to the discretion of frontline personnel. He expressed the view that the use of water hoses and tear gas against cell-confined inmates was an act of punishment rather than an acceptable control measure. He also offered the option that the application of force against Slakan was an outgrowth of the prison system's failure to provide adequate direction to subordinates concerning the proper use of force against any inmate locked in a one-man cell.

Secretary Reed indisputably knew that water hosing was used as a routine control measure in North Carolina prisons. The evidence showed that Reed became Secretary shortly after a highly-publicized incident in which an inmate was hosed for 25 to 30 minutes while helplessly locked in his cell. Although he had no direct hand in the incident, Reed certainly must have been aware of the commission report recommending tighter controls on the use of water hoses in North Carolina prisons. Moreover, the prevalence of the practice was itself a circumstantial indication that administrators at all levels knew and approved of water hosing. The defendants admitted that seven cell-confinded inmates were water hosed at

Central Prison in the months immediately preceding the Slakan attack. Warden Garrison and Director Edwards testified that they had personal knowledge of these incidents and approved of the procedures followed in each case. A non-defendant guard testified that he was involved in at least six incidents of hosings in the year he spent at Central Prison without ever receiving a reprimand. There also was evidence of an incident in which an inmate was handcuffed and hosed for 25 to 30 minutes without any action being taken against the guards. Put bluntly, it is inconceivable that an administrator with direct statutory responsibility for prescribing the operating rules of the prison system would be unaware of a practice as rampant and as widely approved of as the use of water hoses against securely confined inmates. Any doubt about the Secretary's awareness was dispelled by the testimony of Warden Garrison, who indicated that Reed knew of the water hosing practices.

B

[9] The failure of Garrison, Edwards and Reed to act in the face of a known risk of harm does not alone establish their liability to Slakan. Though their conduct may be fairly characterized as a breach of their legal and constitutional duties, they are not liable unless an affairmative causal link exists between their inaction and the harm suffered by Slakan. *Rizzo v. Goode,* 423 U.S. 362, 96 S. Ct. 598, 46 L.Ed.2d 561 (1976). *See also Wellington,* 717 F.2d at 936; *Bowen v. Watkins,* 669 F.2d 979, 988 (5th Cir.1982); *Sims v. Adams,* 537 F.2d 829, 831 5th Cir. 1976). The proof of causation may be direct, "as in *Monell,* where the policy commands the injury of which the plaintiff complains . . . [o]r may be supplied by [the] tort

principle that holds a person liable for the natural consequences of his action." *Wellington*, 717 F.2d at 936.

[10] The evidence presented at trial was sufficient to establish that Slakan's injuries were a natural and forseeable consequence of the supervisors' indifference. Warden Garrison, Director Edwards, and Secretary Reed all had varying degrees of knowledge about the excessive and unregulated use of water hoses against unarmed securely confined inmates in North Carolina's Central Prison. As experienced administrators, they were keenly aware of their special statutory and constitutional responsibilities to protect inmates against inhumane intreatment. They all knew, moreover, that water blasts from a high-pressure hose would probably inflict injuries of unpredictable severity on inmates. Finally they were cognizant of the volatile nature of the prison environment and the need to provide clear guidance to frontline personnel on the permissible use of force against defenseless inmates.

The evidence conclusively establishes that, despite the obviousness of the danger and the ease with which it could have been abated, the supervisors failed to act. They provided little or no direction to their subordinates concerning the appropriateness of the water hosing practice or the safeguards that should be followed to protect the inmate from excessive force and injury. Critical decisions relating to permissible water pressure levels, exposure periods, and the circumstances justifying its use against securely confined inmates were all left to the guards' unbridled discretion. This administrative policy, or more accurately lack of policy, invited abuse of the kind experienced by Slakan.

III

[11] Garrison, Edwards and Reed argue that, even if their conduct was actionable under § 1983, they are entitled to qualified immunity from money damages. We disagree. In *Harlow v. Fitzgerld*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2739, 73 L.Ed.2d 396 (1982), the Supreme Court carefully defined the contours of the qualified immunity or good faith defense: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *See also Butz v. Economou*, 438 U.S. 478, 98 S.Ct. 2894, 57 L.Ed.2d 895 (1978); *Procunier v. Navarette, 434 U.S. 555, 98 S.Ct. 855 55 L.Ed.2d 24 (1978); Wood v. Strickland*, 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975); *Scheuer v. Rhodes*, 416 U.s. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974). *Harlow* reaffirmed the principle that a public official cannot escape § 1983 liability by relying solely on his subjective good faith or lack of actual knowledge about the extent of his constitutional or statutory duties. His subjective state of mind is but one part of the formula, for he is presumed to know what the law requires and may be forced to pay money damages when his actions cross those well-marked boundaries. *Harlow*, 457 U.S. at 815, 102 S.Ct. at 2737. *See also McElveen et al. v. Hutto*, 725 F.2d 954 (4th Cir.1984).

The officials involved in the present case had explicit legal guideposts to follow in discharging their duties. At the time of Slakan's beating, the eighth amendment unquestionably protected inmates from the unjustified and excessive use of force by prison officials. *See Bruce v. Wade*, 537 F.2d 850 (5th

Cir.1976); *Pritchard v. Perry*, 508 F.2d 423, 425-26 (4th Cir.1975); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir.) *cert. denied*, 414 U.S. 1033, 94 S.Ct. 462, 38 L.Ed.2d 324 (1973). Roughly the same protection was provided by the North Carolina law. *See* N.C.Gen.Stat. §148-20. Of course, the use of billy clubs, tear gas, and high-pressure hoses against securely confined prisoners was not then, and is not now, unlawful per se, *see Spain v. Procunier*, 600 F.2d at 195; *Clemmons v. Greggs*, 509 F.2d 1338 (5th Cir.) *cert. denied*, 423 U.S. 946, 96 S.Ct. 360 46 L.Ed.2d 280 (1975), but North Carolina officials were or should have been aware of their firmly established duty to ensure that these legitimate instruments of control were not misused. *See Landman v. Peyton*, 370 F.2d 135 (4th Cir.), *cert. denied*, 385 U.S. 881, 87 S.Ct. 168, 17 L.Ed.2d 108 (1966).

Nor can these officials seriously argue that the application of eighth amendment liability to their actions represents a novel or unanticipated development in the jurisprudence governing § 1983 actions. In *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90, which was decided five years before the incident involved here, the Supreme Court stated that officials at the highest levels of government could be individually liable for the constitutional injuries they inflict. Moreover, well before the Slakan incident, this Court and others had acknowledged that the misconduct of frontline personnel could give rise to § 1983 actions against their supervisors in certain circumstances. *See Davis v. Zahradnick, 600* F.2d 458, 459, n. 1 (4th Cir. 1979): Bursey v. Weatherford, 528 F.2d 483, 488 n. 7 (4th Cir.1975) *rev'd other grounds*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *Woodhous v. Virginia*, 487 F.2d 889 (4th Cir. 1973). *See also Wright v. McMann*, 460 F.2d 126 (2d

Cir.), *cert. denied*, 409 U.S. 885, 93 S.Ct. 115, 34 L.Ed.2d 141 (1972). Whether or not these officials were actually aware of their constitutional and statutory obligations, they are presumed to know what the law requires, and may be legally accountable for conduct that violates fixed standards.

IV

[12]The prison guards and supervisory officials raise several evidentiary arguments that deserve brief mention. The first of their contentions is that the trial court erred in relying on North Carolina law for its ruling that conversations between Slakan and his psychologist were privileged and could not be disclosed. We agree, but find the error harmless. Federal Rule of Evidence 501 requires federal courts to determine testimonial privileges in accordance with federal common law, except in cases in which the law of the state supplies the rule of decision. Slakan's federal constitutional claims obviously did not qualify for that exception and, therefore, the district court should have admitted the conversations pursuant to the well-settled federal rule that such communications are not privileged. *See United States v. Meagher*, 531 F.2d 752, 753 (5th Cir.), *cert, denied*, 429 U.S. 853, 97 S.Ct. 146, 50 L.Ed.2d 128 (1976).

[13] Prison officials proffered the evidence to disclose the content of Slakan's communications with his psychologist in order to prove that he accepted partial responsibility for provoking the guard's attack. The same evidence or defense theory, however, was introduced through the testimony of at least two other witnesses. Nathan Rice, an assistant warden at Central Prison, testified that the plaintiff admitted his partial responsibility for the attact during the Warden's investigation of the incident. Slakan himself

admitted that he had verbally confronted the prison guard and initiated physical contact by reaching through his cell doors. He also testified that he felt some responsibility for the incident. In short, the defendants' excluded evidence was merely cumulative of other witnesses' testimony and did not prejudice their attempt to present a provocation defense to the jury.

[14] We find no merit in the defendants' contentions that the trial court erred by allowing a video tape to be viewed by the jury. The tape contained a visual depiction of the force unleashed by a hose squirting water under the fifty five pounds of pressure. It was offered by Slakan to prove that serious injury could result from the indiscriminate and unregulated use of water hoses against inmates — a key element of his eight amendment case against the prison officials. Its relevancy, therefore, was established. The only ground for excluding the evidence was its accuracy.

The water pressure and hose nozzle used against Slakan were the same as those depicted in the videotape documentation. Moreover, the tape was shown in conjunction with the expert testimony of a fireman who was fully qualified to discuss the force generated by high-pressure water hoses. There is no question, then, that the videotape accurately and fairly depicted the force applied against Slakan. In these circumstances, the trial court acted well within the bounds of its discretion in permitting the tape to be viewed by the jury. *See, e.g., Renfro Hosiery Mills Co. v. National Cash Register Co.*, 552 F.2d 1061 (4th Cir. 1977); *Jackson v. Fletcher*, 647 F.2d 1020 (10th Cir. 1981).

[15, 16] We also find no merit in the prison officials' challenge to the admissibility of a correction expert's opinions concerning the punitive nature of North

Carolina's water hosing practices. Federal Rules of Evidence 702 and 704 permit the trial court wide discretion in admitting expert testimony bearing on the ultimate issues in the case. The trail court here exercised that discretion only after assuring itself of the witness's professional expertise and his familiarity with the North Carolina procedures under scrutiny. The court took the additional cautionary step of instructing the jury as to the proper weight to be given to the expert's opinions. Its actions were entirely proper. *See, e.g., United States v. Logan*, 641 F.2d 860, 863 (10th Cir.1981) (expert accountant may testify as to whether funds were improperly removed from agency).

Accordingly, the district court's judgement is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-6542

Charles J. Slakan,

Appellee,

Versus

T. C. Porter; M. M. Walters; Amos Reed; Ralph Edwards; Sam Garrison,

Appellants,

and

J. B. Barefoot; J. G. Watson; D. R. Woodard Jack Lemons,

Defendants.

ORDER

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Sprouse, with the concurrence of Judge Chapman and Judge John W. Peck, United States District Judge, sitting by designation.

For the Court,

JOHN M. GREACEN

CLERK

.1501 GENERAL

(a) Physical force, firearms, tear gas, mace, and other weapons for crowd and individual control will be used only when necessary to prevent escape or injury to staff, citizenry, or inmates; or to prevent damage to prevent damage to property. Each correctional staff member involved in an incident requiring use of force will make an immediate and comprehensive "Use of Force" report to the officer in charge of the unit or institution (DC-422). The report will include all relevant facts including the time and place of the incident and the name of all staff and inmate witnesses. Also, the threatening circumstances that made force necessary must be explained.

(b) The officer in charge will then investigate to determine whether the report of his subordinate is accurate and complete. Before completing his investigation, he will allow the inmate to explain his version of the incident. He will then report the results of his investigation on form DC-422 and submit the form through the chain of command to the Geographic Command Manager, Manager of Institutions, or Manager of the Youth Services Complex. Written statements of all witnesses should be attacted.

(c) When an inmate complains of use of force in grievance and no DC-422 has been completed, the officer in charge will investigate. If he determines that a DC-422 should have been completed, the responsible staff member will be subject to disciplinary action.

(b) The officer in charge will report serious incidents directly by telephone.

(e) Inmates and employees involved in an incident in which force is used will be examined immediately

after cessatin of the incident. Emergency medical treatment will be provided by correctional medical staff. If necessary, those involved will be sent to the nearest medical facility for treatment.

History Note: Statutory Authority G.S. 148-11; 148-46; Effective July 1, 1976.

.1502 APPLICATION

(a) Physical Force. Only the amount of force that appears reasonably necessary will be used. Physical force may be used to maintain reasonable order and security within the Division of Prisons only when necessary to prevent escape, injury to citizens, staff or inmates or to prevent damage or property. Except in the event of an emergency which may result in injury or damage to property, physical force should not be used until other methods of restoring order have been attempted.

(b) Crowd Control Devices. The following provisions will govern the use of tear gas in cannisters and all other tear gas weapons:

(1) Tear gas will only be used as a final measure in the maintenance of order and security in the Division of Prisons and only under emergency conditions, unless specifically approved by the Area Administrator/Institution head. The use of tear gas as a punishment is prohibited. Violations shall subject involved personnel to appropriate disciplinary action.
(2) Tear gas may not be used unless an exit is available or can be made readily available for the inmates following the return of control.
(3) Protective equipment approved by the Director

of Prisons will be made available to correctional staff.

(4) Only standard equipment approved by Director, Division of Prisons shall be employed in the control of an emergency.

(5) Tear gas equipment will be maintained and operational at all times. Sufficient quantities of tear gas and tear gas ammunity to meet a continuing emergency will be maintained in the arsenal.

(c) Individual Control Devices. The following provisions will govern the use of individual control devices:

(1) Designated correctional officers assigned to maximum, close, and medium security units and institutions other than those designated to house youthful offenders, will be authorized to carry hand-held billy clubs, riot batons, slap jacks and mace. Correctional officers at institutions designated to house youthful offenders may be authorized to carry mace and/or hand-held billy clubs subject to approval of the Manager of the Youth Services Complex. Area administrators and institutions heads will be responsible for designating the security posts which are authorized to carry individual control devices. Except under emergency conditions, individual control devices will be used only as a final means of maintaining order and security and after other reasonable means of ensuring order have been attempted.

(2) Mechanical restraints or other physical restraints may be used to control inmates who have threatened to mutilate themselves. If the officer in charge deems this action necessary,

he will temporarily restrain the inmate and immediately contact the unit physician or area psychologist and the area administratory or institution head. Subject to instructions from the unit physicians, the area administrator or institution head may authorized the use of restraints for a period not to exceed 48 hours. The reasons for restraint will be documented on form DC-141. If the unit physician or area phychologist feels that continued restraint is necessary to prevent self-mutilation after this period has expired, he will refer the inmate to the mental health clinic at Central Prison where he can be adequately supervised and treated.

(3) The officer in charge may take necessary action to secure and maintain control over restrained inmates. Every effort will be made to avoid undue physical hardship. Restrained inmates will be temporarily released from their restraints every three hours during the first and second shifts so that they may eat, drink, and take care of their bodily functions. During the third shift, an inmate need not be temporarily released unless he requests to take care of his bodily functions. However, periodic observation will be required during the night at 1 hour intervals and documented on form DC-141.

(d) Firearms. The use of firearms will be authorized only after an inmate has been ordered to halt during an intended escape, or to prevent serious injury to staff or inmates or citizens. Personnel using weapons to prevent escapes or serious injury will make every effort to disable rather than kill the individual fired upon

History Note: Statutory Authority G.S. 148-11 148-46 Effective July 1, 1976.

(g) Use of Force As provided in General Statute 148-46, when any inmate or several combined offer violence to any office or employee, or to any fellow inmate, or attempt to do any injury to state property, or attempt to escape, resist or disobey any lawful command, the officer or employee will use any means necessary to defend himself or to enforce the observance of discipline, or to secure the person of the offender, or to prevent an escape. No officer or employee will strike or lay hands on an inmate except in defense of himself, or unless it be necessary to prevent escape or serious injury to person or property or to quell a distrubance, or to insure compliance with a reasonable lawful order of a correctional officer. In such cases, only the amount of physical force necessary to accomplish the desired result is authorized.

.1502 APPLICATION

(a) Physical Force. Only the amount of force that appears reasonably necessary will be used. Physical force may be used to maintain reasonable order and security within the Division of Prisons only when necessary to prevent escape, injury to citizens, staff or inmates or to prevent damage to property. Except in the event of an emergency which may result in injury or damage to property, physical force should not be used until other methods of restoring order have been attempted.

(b) Crowd Control Devices. The following provisions will govern the use of tears gas in cannisters and all other tear gas weapons:

(1) Tear gas will only be used as a final measure in the maintenance of order and security in the Division of Prisons and only under emergency conditions, unless specifically approved by the Area Administrator/Institution head. The use of

tear gas as a punishment is prohibited. Violations shall subject involved personnel to appropriate disciplinary action.

OFFICE MEMORANDUM

To Shift Heads

PLACE Central Prison

DATE: 12-15-77

FROM: Supt. B.R. Watson

SUBJECT: Restraining of Inmates

Recently I have not been receiving adequate notification and documentation of inmates being restrained. In a memo of this date to Mr. Wheeler I have stressed the importance of the approval of the OIC in the restraining of any inmate.

It will be your responsibility to submit to me documentation in the form of a memo each time an inmate is placed in or removed from restraints. This memo should give detailed information such as reason restrained, by whom requested and by whom approved.

Thank you for your cooperation in this matter

cc: Capt. Stewart
Capt. White
Capt. Hagemann
File

OFFICE MEMORANDUM

TO: Shift Heads

PLACE Central Prison

DATE: 12-19-77

FROM: Supt. B.R. Watson

SUBJECT: High Pressure Water Hose

Expect in cases of extreme emergency the high pressure water hose will not be used except with the permission of the OIC.

cc: Capt. Stewart
Capt. White
Capt. Hagemann
File

OFFICE MEMORANDUM

TO: All Concerned Date 1-9-78

FROM: Capt. R.L. White

RE: Use of Force

1. When possible, use other means available to bring inmate under control.
2. When, in your opinion, it is deemed necessary to use force to bring inmate under control, use only a reasonable amount to gain control of inmate.
3. After force has been used, remember, threatening circumstances that caused force to be used must be explained.
4. Obtain statements from *ALL* staff eyewitnesses.
5. Obtain statement from inmate involved if he wishes to make statement.
6. Render treatment to inmate that force was used on if necessary. (If no injury received have examined at first aid room, regardless).
7. Fill out form DC-422 and route properly.

OFFICE MEMORANDUM

TO: All Concerned DATE: 5/4/78

FROM: Supt. B.R. Watson

RE: Use of restraints for IM Recreation

Effective immediately the use of restraints during recreation periods for Intensive Management Inmates will be discontinued.

Restraints will be used in transferring IM inmates to and from the recreation area however once they are locked inside the recreation area, the restraints will be removed.

The officer supervising the recreation must have the Gas Gun available at all times.

Your cooperation in this matter is appreciated.

cc: Capt. Godfrey
Capt. White
Capt. Hagemann
File

REGULATIONS AND POLICY STATEMENTS
ON THE USE OF FORCE

5 NCAC 2B
INMATE CONDUCT RULES, DISCIPLINE

.0201 GENERAL

(a) Initial, Any member of the State Correction Service or other authorized person who witnesses what appears to be an act of misconduct by an inmate shall take appropriate action to prevent continuation of any actual misbehavior by that inmate. Counseling may be sufficient and should be tried when no additional action appears necessary to stop the misbehavior and prevent a recurrence. Assistance shall be obtained from other personnel when needed to enforce discipline with minimum risk to persons or property. The inmate shall be placed in administrative segregation only when this action appears to be necessary to control that inmate or to prevent further disorder.

(b) Reports. When an observer of apparent misconduct by an inmate concludes that counseling will be sufficient action because the suspected offender does not appear responsive or because of the seriousness of the suspected offense or when an inmate observes serious misconduct, the observer should report the matter to the officer designated by the superintendent to investigate offenses committed.

(c) Investigations

(1) The designated officer shall begin his investigation as soon as possible, and in any event within 24 hours after being notified of a suspected offense. He shall discuss the matter with the person reporting the incident and with

the inmate or inmates accused. Where necessary to ascertain the true facts, he should interview other witnesses, make searches, and employ other appropriate investigatory techniques

(2) *When the investigating officer is satified he has learned the relevant facts, he may dismiss the charges if he concludes* that the facts do not justify further proceeding. *In that event, he shall explain his action to the person reporting the suspected offense and also the inmate accused.*

(3) *If the investigating officer concludes that the facts found do justify further proceedings, he shall obtain written and signed statements from the person reporting the suspected offense, from the suspected offender, and from the other persons providing pertinent information.*

(4) *The accused inmate shall be advised by the investigating* officer that he is entitled to have written statements from his witnesses but the number will be limited to avoid useless repetition of the same substance. When statements are not taken from all of his witnesses, the investigating officer shall record their names with an explanation for not taking their statements.

(5) The investigation officer shall make written notes of any observations made by him during the course of the investigation which directly relate to the alleged offense, and he shall take under his control any physical evidence available.

ORIGINAL

Supreme Court, U.S.
FILED
FEB 13 1985
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

No. 84-762

AMOS E. REED, et al.,
Petitioners,

v.

CHARLES J. SLAKAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

N.C. PRISONER LEGAL SERVICES, INC.
Charles T.L. Anderson

Post Office Box 509
Raleigh, North Carolina 27602
Telephone: (919) 828-3508

ATTORNEY FOR RESPONDENT

TABLE OF CONTENTS

QUESTION PRESENTED..... 1

PARTIES TO THE PROCEEDING..... 2

OPINIONS BELOW..... 2

JURISDICTION..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... 2

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT..... 7

A. PETITIONERS FAILED TO OBJECT TO THE JURY INSTRUCTIONS REGARDING THE LEGAL STANDARD FOR § 1983 SUPERVISORY LIABILITY..... 8

B. THE COURTS BELOW APPLIED THE CORRECT AND ACCEPTED STANDARD OF LIABILITY FOR § 1983 SUPERVISORY LIABILITY 10

C. THE DECISION BELOW IS CONSISTENT WITH THE LAW THROUGHOUT THE CIRCUIT COURTS OF APPEAL..... 15

D. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S VERDICT..... 16

CONCLUSION..... 17

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

CASES

Allee v. Medrano, 416 U.S. 802 (1974) 10

Bowen v. Watkins, 669 F.2d 979 (5th Cir. 1982) 15

Estelle v. Gamble, 429 U.S. 97 (1976) 14

Hague v. CIO, 307 U.S. 496 (1939) 10

Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983) 16

Hays v. Jefferson County, Ky, 668 F.2d 869 (6th Cir. 1982) cert. denied, 459 U.S. 833 (1984) 15

Herrera v. Valentino, 653 F.2d 1220 (8th Cir. 1981) 16

Jerry v. Francisco, 632 F.2d 252 (3d Cir. 1980) 15

King v. Higgins, 702 F.2d 18 (1st Cir. 1983) 15

Lenard v. Argento, 699 F.2d 874 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 69 (1983) 16

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) 15

McCann v. Coughlin, 698 F.2d 112 (2nd Cir. 1983) 15

McClelland v. Factueau, 610 F.2d 693 (10th Cir. 1979) ... 16

Monell v. New York City Department of Social Services, 436 U.S. 658 (1978) 9,10,12,13

Morris v. Travisono, 528 F.2d 556 (1st Cir. 1976) 10

Orpiano v. Johnson, 632 F.2d 1096 (4th Cir. 1980) cert. denied, 450 U.S. 929 (1981) 8

Owens v. Haas, 601 F.2d 1242 (2nd Cir. 1979) cert. denied, 444 U.S. 980 (1979) 15

Rizzo v. Goode, 423 U.S. 362 (1976) 10,12,13

Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980) cert. denied, 449 U.S. 1016 (1982) 15

Villanueava v. George, 659 F.2d 851 (8th Cir. 1981) 16

Wanger v. Bonner, 621 F.2d 675 (5th Cir. 1980) 15

Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982) 15

White v. Washington Public Power Supply System, 692 F.2d 1286 (9th Cir. 1982) 16

Williams v. Bennett, 689 F.2d 1370 (11th Cir. 1982) cert. denied, ___ U.S. ___, 104 S.Ct. 335 (1983) 16

OTHER AUTHORITIES

Eagan, The Scope of Supervisory Liability Under 42 U.S.C. § 1983, 6 J. Contemp. L. 181 (1979) 15

Municipal Liability Under Section 1983: The Meaning of "Policy or Custom," Note, 78 Col. L. R. 308 15

5A Moore Federal Practice § 50.07 (2nd Ed. 1977).. 16

NORTH CAROLINA STATUTES AND REGULATIONS Appendix

N.C. Gen. Stat. § 148-4, 11, 20, 31, 36 ..... K 3

5 NCAC 2A .0101 ..... K 4

5 NCAC 2F .1502 (3)(4) ..... K 5,6

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

No. 84-762

AMOS E. REED, et al.,
Petitioners,

v.

CHARLES J. SLAKAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO: THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE SUPREME
COURT OF THE UNITED STATES

The Respondent, Charles J. Slakan, prays that a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit, filed June 5, 1984, and Order denying the Petition for Rehearing, filed August 13, 1984, be denied.

QUESTION PRESENTED

Pursuant to Supreme Court Rule 34.2, Respondent Charles J. Slakan offers the following correction and supplementation to Petitioner's statement of the Question Presented.

WHETHER STATE PRISON SUPERVISORY OFFICIALS CAN BE HELD PERSONALLY LIABLE FOR DAMAGES UNDER 42 U.S.C. § 1983 FOR THE UNCONSTITUTIONAL USE OF FORCE AGAINST A SINGLE, CELL-CONFINED INMATE BY TWO GUARDS ON THE BASIS OF THEIR DELIBERATE INDIFFERENCE TO OR TACIT AUTHORIZATION OF A PATTERN OR PRACTICE OR POLICY OF INDISCRIMINATE OR EXCESSIVE USE OF FORCE AGAINST CELL-CONFINED INMATES WHICH WAS FOUND BY A JURY TO CAUSE THE UNCONSTITUTIONAL ASSAULT.

PARTIES TO THE PROCEEDING

OPINIONS BELOW

JURISDICTION

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Pursuant to Supreme Court Rule 34.2, these items are omitted since Respondent is satisfied with Petitioners' statement of each of these items.

COUNTERSTATEMENT OF THE CASE

Pursuant to Supreme Court Rule 34.2, Respondent Charles J. Slakan offers the following correction and supplementation to Petitioners' statement of the case.

First, Petitioners claim that guards "squirted or attempted to squirt him with two fire hoses" and "[A] small amount of tear gas was also sprayed into the cell by Walters." (PWC p 6).[1] Testimony during the trial indicated that two high pressure fire hoses and a dispenser of CS gas were used against Mr. Slakan while he was unarmed and locked in a single cell. The parties stipulated that manufacturer's instructions expressly stated that the CS gas was not for indoor use. Respondent testified at trial that the water pressure from the fire hoses forced him to the back of the cell and forced all the air out of the cell, making breathing difficult and requiring him to brace himself against the cell sink to keep from falling or being knocked to the floor. When he attempted to indicate his submission to the guards, the spray was directed at his hand and head. (Respondent's Appendix A 3-6). Then gas was sprayed into the cell, causing Mr. Slakan's lungs and eyes to burn and making breathing even more difficult.

---

[1] The parenthetical reference "PWC" is shorthand for Petitioners' Petition for a Writ of Certiorari to the United States Fourth Circuit Court of Appeals. "Respondent's Appendix," referenced in the text is lodged with the Clerk's Office and is not attached to the Respondent's Brief in Opposition.

When he attempted to move to the front of the cell to get air, the spray of the hoses was used to pin him to the back of the cell. (Respondent's Appendix A 7-11). Three guards then entered the cell and beat him repeatedly with night sticks or riot batons about the head and body (Respondent's Appendix A 12-19), resulting in bruises, contusions and four lacerations requiring sixty-one (61) sutures and considerable loss of blood. (Respondent's Appendix B 1). Mr. Slakan's account of the force used against him was corroborated by the testimony of an inmate in an adjacent cell and by the testimony of inmate James C. Mitchell, who similarly described a hosing he suffered while handcuffed and locked in a cell.

Second, with respect to Mr. Slakan's claims against the Petitioners, evidence and testimony not mentioned in Petitioners' statement (PWC p 4-5) was offered in support of the affirmative link or causal connection between the unconstitutional assault on Mr. Slakan and the conduct of the Petitioners.

As Petitioners note, eight accounts of use of force against cell confined inmates, including one incident in which the inmate was hosed while handcuffed and locked in his cell, were admitted into evidence. Each of these incidents, which occurred within the year preceding the assault on Mr. Slakan, is described in the opinion below. (Petitioner's Appendix A 14, 15). The 1975 Inmate Grievance Recommendation against indiscriminate use of high pressure fire hoses against cell-confined inmates[2] (Respondent's Appendix C-5) was also admitted into evidence. That report found that high pressure hoses were being used against cell-confined inmates for periods of 10-60 minutes. Mr. Slakan also introduced expert opinion testimony to support his claim that Petitioners knew or should have known of guards' abusive conduct and acquiesced in or approved said practices causing his unconstitutional assault.

---

[2] It was stipulated at trial that under state law the Commission consisted of five persons appointed by the Governor with a statutory duty to investigate inmate complaints and, upon a finding of merit, report its findings and recommendations to the Secretary of Correction.

Robert E. Swiger, Town of Carrboro Fire Chief, testified at trial in a video-taped deposition, demonstrating the prison fire hose for the jury at the 55 p.s.i. (pounds per square inch) pressure which Mr. Slakan identified as comparable to the force he was subjected to. This pressure was also certified in prison tests of the hose. Fire Chief Swiger testified that a straight stream of water from that hose "could probably hurt" a man "in critical areas of the body," that the water could probably streak or redden the back or chest, and, depending upon the size of the individual, it could knock him down or push him back. (Respondent's Appendix D 1,2).

Arnold Pontesso, now retired after serving as a warden at U.S. Bureau of Prisons and as Secretary of Correction in Oklahoma, testified that the approved policies permitting use of high pressure fire hoses and tear gas against cell-confined inmates could not be justified penalogically and constituted summary punishment. (Respondent's Appendix E 2). Mr. Pontesso further testified that the Department of Correction's Response (Respondent's Appendix F 1-2) to the 1975 Inmate Grievance Commission Recommendation manifested "a callous disregard for the safety and security of inmates" and that, in his opinion, the evidence established that a pattern or practice of excessive use of force against cell-confined inmates[3] existed at Central

---

[3] Additional evidence supporting this finding (and corroborating Mr. Slakan's testimony) included the testimony of one defense witness who testified that as a guard at Central Prison he had been personally involved in five or six hosings, that the general practice was to put the nozzle in the food tray of the cell foor, 106 inches from the back of the cell, that inmates would attempt to crawl under their bunks on the wet cell floor to get away from the hose spray, that the force of water was strong enough to knock a coffee cup out of an inmate's hand and pin him to the back wall of the cell, that the water would knock an inmate around the back of his cell at full pressure and that the water would sting and bruise an inmate's skin. (Respondent's Appendix G 1-10).

Defendant Sgt. Walters, a guard at Central Prison, testified somewhat ambiguously that he would use the high pressure fire hose to force the air out of the cell and that the hose, when operative, required two men to hold the nozzle. (Respondent's Appendix H 5-7). He further testified that he had received no formal training in use of the high pressure fire hose or the CS gas (except observed demonstrations) and he had no knowledge that the CS gas was not recommended for indoor use. (Respondent's Appendix H 1-3).

Defendant guard Porter, who testified on direct that he hit Mr. Slakam "like he would a dog," (Respondent's Appendix I 1), admitted on cross-examination that the high pressure hose, when

Prison. (Respondent's Appendix E 10,14,22,31,32). Finally, Mr. Pontesso testified that, in his expert opinion, the assault upon Mr. Slakan was a result of policies or customs approved by the Petitioners, and these supervisory officials failed to take reasonable steps to insure that fire hoses, tear gas and billy clubs used against cell-confined inmates would not be used in an excessive and unjustified manner. (Respondent's Appendix E 23-26, 31).

In addition to Petitioners' admission[4] in their Answer that they approved the use of high pressure fire hoses and tear gas against cell-confined inmates, further evidence came into the record to support the causal relationship between their conduct and the assault on Mr. Slakan.

Petitioner Reed

Correctional expert Pontesso testified that Secretary Reed should have known of the Inmate Grievance Commission Recommendation in the exercise of ordinary care as Secretary of Correction. (Respondent's Appendix E 12-13, 31). Petitioner Garrison testified that he assumed Petitioner Reed knew of the manner in which hoses were used against cell-confined inmates. (Respondent's Appendix J 9). Mr. Pontesso further testified that use of force practices accepted or approved by Petitioner Reed

---

operative, required two men to hold and operate it. (Respondent's Appendix I 4). Porter further testified that no supervisor had ever personally reviewed a use of force incident with him and that he received no formal training in the use of a riot baton. (Respondent's Appendix I 5-7).

[4] Petitioners now contend that a fact admitted in their Answer and stipulated to in the Pretrial Order, i.e. that Petitioners approved of the use of high pressure fire hoses and tear gas against individual cell-confined inmates, was not read to the jury. Respondent contends that this stipulated fact was read to the jury after they viewed the video taped deposition of Fire Chief Swiger, which included a demonstration of the hose; however, the Court reporter was dismissed at the time the video tape was played and no record was made of the reading of the stipulation. In any event, the fact was before the trial judge in his determination of the Petitioners' Motion for New Trial.

(and Edwards and Garrision) could never be deemed appropriate and that the conduct of Petitioners did not represent reasonable remedial action to curtail or prevent continuing abusive practices (Respondent's Appendix E 25). In his expert opinion, it was "evident" that Mr. Slakan's unconstitutional assault was "a result of policies adopted or approved, or customs approved by the ... Secretary of Correction." (Respondent's Appendix E 24-26). This evidence, taken in conjunction with Petitioner's affirmative statutory duties to safeguard the welfare of inmates (Respondent's Appendix K 1-3), supports the jury's finding of liability against Petitioner Reed.

Petitioner Edwards

During his testimony Petitioner Edwards admitted that he knew of and approved the use of high pressure fire hoses and tear gas against cell-confined inmates and that he would ordinarily have been (and in all probability was) consulted regarding the 1975 Inmate Grievance Commission Recommendation.[5] (Respondent's Appendix L 3-5). In spite of the fact that he had the responsibility for the day to day operation of the prisons and the approval of equipment used to control emergencies (5 NCAC 2A .0101, 2F .1501 (b)(3) & (4); Respondent's Appendix K 4-6), Edwards admitted that (1) he never inspected or examined the high pressure fire hoses he approved, (2) he never issued orders requiring officers to supervise the guards' use of fire hoses or limit the time and manner that an inmate could be hosed; and (3) he never requested expert advice regarding the risk of injury from hosings. (Respondent's Appendix L 5-7). As in the case of

---

[5] The Response to the Recommendation states the Edwards "was fully briefed on the incident and he indicates his support of the action taken by the officers ... ." and "... recommendations ... (2) that the high pressure water hoses not be used on inmates locked within a cell unless there is imminent threat of phsyical danger to another person or with direct approval of the Warden, Deputy Warden or Shift Supervisor are DISAPPROVED." (Respondent's Appendix F 2).

Petitioner Reed, correctional expert Pontesso found Edward conduct to be deliberately indifferent to the threat of at inmates and causally related to the unconstitutional assau Mr. Slakan.

Petitioner Garrison

Petitioner Garrison had statutory responsibility for welfare of inmates assigned to his prison (Respondent's Ap K 3) and personally reviewed and approved use of force rep each of the nine incidents of use of force introduced in e at trial, including the hosing of a cell-confined, handcuf inmate. On cross examination, he admitted knowledge of an incident (not in the record) in which an inmate received a injury from a hosing. (Respondent's Appendix J 1,2). He admitted knowledge and approval of the Department's Respon the Inmate Grievance Commission Recommendation (that use o practices be reformed) as well as the fact that use of for practices and policies had not been altered after the Comm Recommendation, or after any of the use of force incidents evidence. (Respondent's Appendix J 11).

REASONS FOR DENYING THE WRIT

The petition for writ of certiorari should be denied. Petitioners' assertion that the verdict of the jury, enter after a four day trial, and the decisions of the district appellate courts "negate[s] the requirement of personal involvement as a predicate to liability under 42 U.S.C. § is not supported by a review of the record. Examination o Petitioners' statement of the Question Presented makes it difficult to discern whether Petitioners now challenge the standard applied in the courts below, or the sufficiency o

evidence supporting the jury's verdict. However, in either event, the record and the law support that verdict and dictate that a writ of certiorari be denied.

A. PETITIONERS FAILED TO OBJECT TO THE JURY INSTRUCTIONS REGARDING THE LEGAL STANDARD FOR § 1983 SUPERVISORY LIABILITY

It should first be observed that Petitioners did not object to the jury instructions at the charge conference during the trial. Portions of the instructions addressing the liability of the supervisory defendants, which are now apparently challenged, are set forth in the Respondent's Appendix, M 1-3.

The instructions clearly instructed the jury that "the greater weight of the evidence" must show that the supervisory officials "in some manner, acted personally in the deprivation of plaintiff's rights" and that "they may not be held liable merely on the grounds that they were the guards' supervisors in the chain of command. The plaintiff must establish a personal connection between the action or inaction of the supervisory defendants and the denial of the plaintiff's constitutional rights." (Respondent's Appendix M 1).

The instructions then state that personal involvement may be shown by proof of authorization in advance "which may have come from the policies and procedures instituted by these defendants." (Respondent's Appendix M 2). The trial court further instructed the jury, without objection, that personal involvement may be shown by acquiescence in alleged excessive use of force by the guards, [see Orpiano v. Johnson, 632 F.2d 1096, 1101 (4th Cir. 1980), cert denied, 450 U.S. 929 (1981)], if the jury found that "there was a pattern of instances where excessive and unreasonable force was used against him and/or other prisoners which was so pervasive that the defendant knew or should have

known about it, and failed to take reasonable steps to remedy the wrongdoing, such that his deliberate indifference was in effect a tacit authorization of the use of excessive and unreasonable force against plaintiff." The jury received additional instruction that the evidence must show that there were a number of such incidents such that supervisors were or should have been put on notice that subordinates engaged in an unlawful practice (excessive force) against a group of inmates of which plaintiff Siskan was a member. (Respondent's Appendix M 2)

With reference to Monell v. New York City Department of Social Services, 436 U.S. 658 (1978), the trial court instructions stated that supervisory defendants' policies or customs, which could be established by omissions as well as affirmative acts, could expose such defendants to liability if the policies or customs caused plaintiff's injury. And further, that officials with rule making responsibilities could be liable if their "unreasonable" failure to make rules (1) "rose to the level of deliberate indifference to plaintiff's constitutional rights or constituted tacit authorization of unconstitutional practices" and (2) "caused their employees unconstitutional practices." The instructions then recite the established statutory and regulatory rule-making powers of each of the three supervisory defendants. (Respondent's Appendix M 3)

Petitioners' failure to object to the instructions, which were drafted after a charge conference and include verbatim portions of Petitioners' own requested jury instructions (Respondent's Appendix M 1-3), should estop them from challenging the legal standard applied below. Rule 51, F.R.Civ.P., specifically prohibits assignment of error to a jury charge or instruction absent a timely objection. Rule 51 has been applied

strictly by federal appellate courts, subject to a limited plain error exception. Morris v. Travisono, 528 F.2d 856 (1st Cir. 1976).[6]

B. THE COURTS BELOW APPLIED THE CORRECTION AND ACCEPTED STANDARD OF LIABILITY FOR § 1983 SUPERVISORY LIABILITY

Petitioners assert that the decisions below have circumvented the requirement, attributed to Rizzo v. Goode, 423 U.S. 362 (1976) and Monell, supra, that "there must be evidence of an 'affirmative link' between a subordinate's misconduct and the adoption of a plan or policy showing the supervisors authorized such misconduct." (PWC p 6). Scrutiny of those cases and the record of the case sub judice refute petitioners' contention.

Rizzo, which involved claims for injunctive relief against the Philadelphia Police Department, addressed itself to the courts' exercise of equitable powers under § 1983 and recognized that previous decisions had properly upheld injunctions[7] against supervisory defendants under § 1983. See Hague v. CIO, 307 U.S. 496 (1939) and Allee v. Medrano, 416 U.S. 802 (1974).

The Rizzo Court found the district court findings and conclusions insufficient to support § 1983 injunctive relief in several regards. First, the individual policemen found to have violated constitutional rights were not named as party defendants with the defendant Mayor and police supervisors. Second, the facts revealed no "affirmative link between the occurrence of the various incidents of police misconduct and the adoption of a plan

---

[6] "Rule 51 is of considerable importance for the orderly and just functioning of the judicial system" and, "'[I]f there is to be a plain error exception to Rule 51 at all, it should be confined to the exceptional case where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings.'" [quoting E.C. Wright & A. Miller, Federal Practice and Procedure § 2558, at 675 (1971)] Id., at 859.

[7] The Rizzo court observed that the "principles of equity ... militate against the grant of an injunction except in the most extraordinary circumstances." Id., at 379. A claim for damages under § 1983 does not involve the important and delicate principles of equity or federalism which were before the Court in Rizzo.

or policy by petitioners--express or otherwise--showing their authorization or approval of such conduct." (Emphasis added) Id., at 371. Third, the only connection found to exist between plaintiffs and supervisory defendants was the likelihood of future injury to non-parties absent changes in police disciplinary procedures. Fourth, the conclusion that a "pattern" of police misconduct existed was deemed inconsistent with the district court's finding that the challenged police behavior was typical of major urban police departments. Id., at 375.

The facts of the case sub judice are distinquished with respect to each of these issues. First, Petitioners herein were joined as defendants with the prison guards who assaulted Mr. Slakan on August 3, 1979.

Second, an "affirmative link" was established between plans and policies of the Petitioners and the unconstitutional assault on Mr. Slakan by evidence of (1) a 1975 Inmate Grievance Commission Recommendation to the Department of Correction that indiscriminate use of force, including high pressure fire hoses, against cell-confined inmates be curtailed; (2) Petitioners' actual or constructive knowledge and disregard of the Recommendation[8] and the threat to the rights of inmates it portended and; (3) the existence of a pattern of excessive use of force against cell-confined inmates[9] and; (4) the refusal or failure of Petitioners to take any meaningful or reasonable steps to remedy or curtail the use of excessive force against cell-confined inmates.

---

[8] Petitioners Garrison and Edwards, both of whom were referenced in the response to the Recommendation, admitted knowledge or probable knowledge of the Recommendation. Respondent's correctional expert witness testified that these officials and petitioner Reed should have known of the Recommendation in the exercise of ordinary care in their supervisory positions.

[9] Accounts of eight incidents of force against cell-confined inmates, including one incident involving an inmate being sprayed with a high pressure fire hose, were admitted into evidence by stipulation. The accounts were derived exclusively from prison guards' reports from one prison and spanned a period of one year prior to the assault on Mr. Slakan. Discovery of these incidents was resisted by Petitioners and broader discovery was not deemed necessary.

Third, Arnold Pontesso, a retired Bureau of Prison Warden and former Secretary of Correction in Oklahoma, testified that the prison practices regarding use of force against cell-confined inmates constituted a pattern of excessive use of force, uncommon, unacceptable and virtually unheard of in his experience in corrections. Thus, the approved conduct of the guards, unlike the behavior in Rizzo, cannot be characterized as typical of similar systems managed by supervisory defendants.

Finally, unlike Rizzo, the record herein indicates that the incidents of use of force against cell-confined inmates established "common thread" or "'pervasive pattern of intimidation' flowing from a deliberate plan by the named defendants...," Id., at 375.

Monell, which involved a challenge to a municipal agency's policies compelling unpaid, medically unnecessary pregnancy leave, is consistent with Rizzo in rejecting vicarious or respondeat superior liability under § 1983 while recognizing that supervisory action or inaction that causes the deprivation of rights is actionable under § 1983. Monell observed first that the language of the legislation specifically held liable "any person who, under color of state law...shall subject or cause to be subjected, any person...to the deprivation of rights... ." Id., at 692-693. [Quoting 42 U.S.C § 1983].

> "The italicized language plainly imposes liability on a government that, under color of some official policy 'causes' an employee to violate another's constitutional rights."

Ibid.

By reference to the legislative history of the Civil Rights Act, the Monell Court found that liability under respondeat superior was not intended under § 1983, but rather, that a supervisory governmental unit or official could be deemed liable if it was found to have "caused" the deprivation under § 1983. From the legislative history of § 1983, Monell suggests the supervising governmental bodies, as well as individuals, may be

held liable and to have caused the deprivation of rights if they "had power to intervene" and "neglect[ed] or refuse[d] to do so." Id., at 692 n. 57.[10]

> "[L]ocal governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels."

Id., at 690-91.

The teachings of Monell[11], as well as the holding in Rizzo, were carefully applied in the case sub judice, wherein the district court instructed the jury that supervisory defendants must be shown to have acted personally, in some manner, and thus caused the deprivation of rights to be "visited" upon Mr. Slakan. The district court properly charged that the requisite personal involvement could be shown by proof of the existence of a pattern of excessive and unreasonable force against inmates like Mr. Slakan (cell-confined) such that the officials knew or should

---

[10] In the Appendix to the Opinion of the Court, the full text of the second conference substitute for the Sherman Amendment is set forth.

> "[A]ny person or persons having knowledge that any of the wrongs conspired to be done and mentioned in the second section of this act are about to be committed, and having power to prevent or aid in preventing the same, shall neglect or refuse to do so, and such wrongful act shall be committed, such person or persons shall be liable to the person injured, or his legal representatives." (Emphasis Added)."

Id., at 704. Earlier legislative discussion of the Act stated that "[t]he primary constitutional justification for the Sherman amendment was that it was "necessary and proper remedy for the failure of localities to protect citizens..." and "... the amendment came into play only when a locality was at fault or had knowingly neglected its duty to provide protection." (Emphasis added.) Id., at 692 n. 57.

[11] Monell interpreted Rizzo in a manner consistent with the court's below: "[B]y our decision in Rizzo v. Goode, [supra], we would appear to have decided that mere right to control without any control or directions having been exercised and without any failure to supervise is not enough to support § 1983 liability." (Emphasis Added). Id., at 694 n.58 By showing supervisors' disregard for the known need to control and supervise, Respondent's evidence established precisely the "affirmative link" which was absent in Rizzo.

have known about it, and failed to take reasonable remedial steps to the point that their conduct evidenced deliberate indifference to or tacit authorization of the use of excessive force.[12]

The record in the case sub judice, unlike that in Rizzo, clearly supports the finding of an affirmative link between the guards' violation of Mr. Slakan's eighth amendment rights and the supervisory defendants' adoption of a plan or policy tacitly authorizing such misconduct. The Petitioners all knew and approved of the complained-of practices. Each Petitioner knew or should have known of the Inmate Grievance Commission's Recommendation against the indiscriminate use of force against cell-confined inmates. Hosings and macings of cell-confined inmates continued unabated.

Based upon the record, the jury found that Petitioners had or should have had knowledge of the past abusive practices and the likelihood of continued abuse if they refused to take remedial action. The record supports the jury's finding of Petitioners' authorization of, indifference to, or acquiescence in the abusive practices of the guards which caused the deprivation of Mr. Slakan's rights.

Indeed, the jury's recognition of this "link," as well as the weight of the evidence supporting the supervisory defendants' personal responsibility for Mr. Slakan's injury, is reflected in the award of damages among the respective defendants.[13] Through deliberate indifference to a known policy of indiscriminate use

---

[12] In the context of medical care to prisoners, the Court recognized the distinction between inadvertent and advertent conduct in Estelle v. Gamble, 429 U.S. 97 (1976).

> "...in the medical context, an inadvertent failure to provide medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to 'be repugnant to the conscience of mankind.' ... In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs. It is only such indifference that can offend 'evolving standards of decency' in violation of the Eighth Amendment." Id., 429 U.S., at 100, 101.

[13] The jury's perception of the facts and acceptance of the Respondent's theory of the case is borne out by the award of damages. Five hundred dollars ($500.00) in compensatory damages were awarded against five of the six defendants. Awards of punitive or exemplary damages increased with respect to the defendants' authority: Reed ($10,000.00), Edwards ($8,000.00), Garrison ($7,000.00); Walters ($3,000.00); Porter ($2,000.00).

of force against cell-confined inmates, the Petitioners caused Mr. Slakan to be subjected to a deprivation of his rights under the Eighth Amendment of the United States Constitution. Section 1983 liability for such conduct is supported by equity, common sense, the language of the Act, its legislative history, and the decisions of this Court.[14]

C. THE DECISION BELOW IS CONSISTENT WITH THE LAW THROUGHOUT THE CIRCUIT COURTS OF APPEAL

Petitioners assert that the decision below has new and undesired implications as to supervisory officials' liability under § 1983. However, except for the evidence and jury verdict, Mr. Slakan's case and the legal standards applied below merely reflect the law as it has been interpreted throughout the circuit courts of appeal.[15] Petitioners do not contend that a conflict

---

[14] See, e.g. Municipal Liability Under Section 1983: The Meaning of "Policy or Custom," Note, 78 Col.L.R. 308; Eagan, The Scope of Supervisory Liability Under 42 U.S.C. § 1983, 6 J. Contemp. L. 181 (1979).

[15] Cases involving § 1983 claims for damages against supervisory officials or governmental units have applied the law in a manner consistent with the decision below. Cases turn on the facts in the record supporting "supervisory" liability. King v. Higgins, 702 F.2d 18, 21 (1st Cir. 1983)(damages against prison superintendent for failure to correct improper disciplinary procedure after receiving notice; "[D]efendant apparently does not dispute the fact that as the official designated to hear prisoners' appeals, he should be liable in damages for his inaction in curing deficiencies in the disciplinary proceedings of which he was aware. See Rizzo v. Goode [supra]."); Turpin v. Mailet, 619 F.2d 196, 201-202 (2nd Cir. 1980), cert. denied, 449 U.S. 1016 (1982)(city may be liable for damages under § 1983 "where senior personnel have knowledge of constitutionally offensive acts but fail to take remedial steps" amounting "to deliberate indifference to or tacit authorization of the offensive acts;" evidence held insufficient to support inference), see also Owens v. Haas, 601 F.2d 1242, 1246 (2nd Cir. 1979) cert. denied, 444 U.S. 980 (1979), McCann v. Coughlin, 698 F.2d 112 (2nd Cir. 1983); Jerry v. Francesco, 632 F.2d 252, 256 (3d Cir. 1980)(J. Adams, concurring)(warden with statutory duty to safeguard jail inmates may be held liable for § 1983 damages resulting from "general conditions and policies within the superivory purview of the officer in charge of the prison."); Wanger v. Bonner, 621 F.2d 675, 680 (5th Cir. 1980)(Sheriff may be held liable for damages under § 1983 for acts of deputies if "he knew of or should have known that allegedly unconstitutional acts were occurring and acquiesced in them," causing violation of rights), see also Languirand v. Hayden, 717 F.2d 220, 227-228 (5th Cir. 1983), Webster v. City of Houston, 689 F.2d 1220 (5th Cir. 1982), Bowen v. Watkins, 669 F.2d 979, 988-89 (5th Cir. 1982); Hays v. Jefferson County, Ky, 668 F.2d 869, 874 (6th Cir. 1982) cert. denied, 459 U.S. 833 (1982) ("At a minimum a plaintiff must show that the [supervisory] official at least implicity authorized, approved or

exists within the circuits and, contrary to their assertions, the case sub judice does not present a new developement or even a change in the law.

D. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE JURY'S VERDICT

Petitioners further argue that their conduct was too remote from the unconstitutional assault on Mr. Slakan to establish liability. The court below correctly observed that this same contention, regarding causation or proximate cause, raised an issue essentially of fact, not law, Slakan, 737 F.2d at 373, and found the evidence more than sufficient to support the jury's finding. As observed by the Fourth Circuit Court of Appeals, "fact finding by jury will be set aside only where evidence, viewed in light most favorable to prevailing party, is so clearly wrong that reasonable persons could not reach any other conclusion than asserted by the losing party on appeal." See e.g. 5A Moore Federal Practice § 50.07 [2] at 50-82 to 50-83 (2nd Ed. 1977). The recitation of the evidence set forth in the court

---

knowingly acquiesced in the unconstitutional conduct of the offending officers."); Lenard v. Argento, 699 F.2d 874, 886 (7th Cir. 1983) cert. denied, ___ U.S. ___, 104 S.Ct. 69 (1983)("Only where there is a pattern of constitutionally offensive acts with failure to invoke remedial measures will there result in municipal liability for subsequent violations 'if the supervisor's inaction amounts to deliberate indifference or tacit authorization of the offensive acts.'" [quoting Turpin v. Mailet, [supra.]); Villanueva v. George, 659 F.2d 851, 854 (8th Cir. 1981)(En Banc)(chief jailor may be held liable for money damages under § 1983 if he had knowledge that detainees "conditions of confinement were punitive and yet refused to remedy same. See Estelle v. Gamble [supra]"), see also Herrera v. Valentine, 653 F.2d 1220, 1224 (8th Cir. 1981); White v. Washington Public Power Supply System, 692 F.2d 1286, 1290 (9th Cir. 1982)(evidence insufficent to support § 1983 damages/liability against public corporation; "[t]here must be a showing either of official sanction of the agents' acts, or of culpable negligence, or impliedly or tacitly authorized approved or encouraged discriminatory conduct as a matter of course on the part of the employer in failing to correct known slurs or other discriminatory acts of its employees."), see also Haygood v. Younger, 718 F.2d 1472 (9th Cir. 1983); McClelland v. Facteau, 610 F.2d 693, 697 (10th Cir. 1979)(cause of action under § 1983 exists against police chief for allegedly abusive acts of subordinates if chief "knew or should have known of the misconduct and yet failed to act to prevent future harm."); Williams v. Bennett, 689 F.2d 1370, 1380-1381, (11th Cir. 1982), cert. denied, ___ U.S. ___ 104 S.Ct. 335 (1984)(§ 1983 action for damages against individual prison officials for subjection to cruel and unusual prison conditions requires a showing of deliberate indifference to his need for reasonable protection from violence which in fact caused the deprivation of rights).

of appeals' opinion clearly indicates that the evidence was sufficient to support the verdict against the Petitioners herein. Compare Turpin v. Mailet, supra.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted, this the ___ day of February, 1985.

NORTH CAROLINA PRISONER LEGAL SERVICES, INC.
Attorney for Respondent

By: _____

Charles T. L. Anderson
Post Office Box 509
Raleigh, North Carolina 27602
Telephone: (919) 828-3508

No. 84-762

Supreme Court, U.S.
FILED
FEB 26 1985
ALEXANDER L. STEVAS
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

AMOS E. REED, *et al.*,
Petitioners,

V.

CHARLES J. SLAKAN,
Respondent.

PETITIONERS' REPLY BRIEF

LACY H. THORNBURG
ATTORNEY GENERAL OF
NORTH CAROLINA

Jacob L. Safron
Special Deputy Attorney General

Lucien Capone, III
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7188

ATTORNEYS FOR PETITIONERS

DiCesare and Associates Printing • Washington, D.C. • (202) 331-8101

13pp

TABLE OF CONTENTS

TABLE OF CASES ii

ARGUMENT 1

THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AS WELL AS THOSE OF THE OTHER CIRCUITS 1

CONCLUSION 7

Table of Cases

Bailey v. Turner, 736 F.2d 963 (4th Cir. 1984) 3

Estelle v. Gamble, 429 U.S. 97 (1976) 4, 5

Hays v. Jefferson County, 668 F.2d 869 (6th Cir.), *cert. denied,* 459 U.S. 833 (1982) 2, 4

Languirand v. Hayden, 717 F.2d 220 (5th Cir. 1983) . 3

Lenard v. Argento, 699 F.2d 874 (7th Cir.), *cert. denied,* ____ U.S. ____ , 104 S.Ct. 69 (1983) 3

Monell v. New York City Dept. of Soc. Services, 436 U.S. 658 (1978) 3

Rizzo v. Goode, 423 U.S. 362 (1976) 2

Turpin v. Mailet, 619 F.2d 196 (2nd Cir. 1980), *cert. denied,* 449 U.S. 1016 (1982) 3

Wagner v. Bonner, 621 F.2d 675 (5th Cir. 1980) 3

MISCELLANEOUS

42 USC § 1983 ..... 1, 4

No. 84-762

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

AMOS E. REED, *et al.*,

Petitioners,

V.

CHARLES J. SLAKAN,

Respondent.

PETITIONERS' REPLY BRIEF

TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Petitioners Amos Reed, Ralph Edwards and Sam Garrison respectfully submit the following brief in reply to Respondent's brief opposing the Petition for Writ of Certiorari, pursuant to Supreme Court Rule 22.

ARGUMENT

THE DECISION OF THE FOURTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT AS WELL AS THOSE OF THE OTHER CIRCUITS.

Respondent argues that the Fourth Circuit applied the correct legal standards relating to supervisory liability under 42 USC § 1983 and that those standards merely reflect the law as interpreted by other circuit courts of appeal. (Respondent's Brief in Opposition, pp. 15-16). However, a close reading of the cases cited by Respondent

reveals the contrary to be true. Those cases unequivocally hold that supervisory liability for the unconstitutional conduct of subordinates may not be predicated upon the mere failure of the supervisors to make rules governing their subordinates' conduct. Rather, there must be clear evidence of a nexus between the subordinates' misconduct and the adoption of a plan or policy by the supervisors showing their authorization of such misconduct. *Rizzo v. Goode,* 423 U.S. 362 (1976). For example, in *Hays v. Jefferson County,* 668 F.2d 869 (6th Cir.), *cert. denied,* 459 U.S. 833 (1982) the court said,

> The result of *Rizzo* and subsequent cases in the lower federal courts applying the standards it announced is that a failure of a supervisory official to supervise, control or train the offending individual officer is not actionable absent a showing that the official either encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.

Id. at 874.

The cases cited by Respondent hold that a plaintiff can meet his burden in one of two ways. He can either show that the subordinates acted pursuant to a supervisory policy directive unconstitutional on its face, or that the supervisor, *with knowledge* of a past pattern and practice of unconstitutional conduct *failed to take any action* to remedy the situation thus leading to the inference that the supervisor authorized such misconduct.

An example of the first type of case is *Wagner v. Bonner*, 621 F.2d 675 (5th Cir. 1980), in which a police chief was held responsible for an unconstitutional search by deputies acting pursuant to the chief's policy that specified the manner of that search. Relying on *Rizzo* the Court expressly held that the chief could not be held liable for a failure to adopt policies to prevent constitutional violations. Rather, his liability

> [w]as based upon affirmative policies that he had acknowledged adopting concerning the manner in which arrest warrants were to be served and that the evidence showed had precipitated the alleged unconstitutional actions of his deputies.

Id. at 680-81.

Wagner presents the classic *Monell v. New York City Dept. of Soc. Services*, 436 U.S. 658 (1978) case of subordinates acting pursuant to an unconstitutional policy. However, Respondent in this case has never contended that Petitioners' use of force policies were unconstitutional.[1] Rather, Respondent's theory (adopted by the Fourth Circuit) has been that Petitioners failed to make *adequate* rules governing the use of force. Support for this theory must be found in the second line of cases cited by Respondent. *See, e.g., Languirand v. Hayden*, 717 F.2d 220 (5th Cir. 1983); *Lenard v. Argento*, 699 F.2d 874 (7th Cir.), *cert. denied*, _____ U.S. _____, 104 S. Ct. 69 (1983); *Turpin v.*

---

[1]In fact such a position would be untenable since the policies expressly directed that only reasonable force be used (see A-27 to 38, Petitioner For Writ of Certiorari) and since there is no *per se* prohibition on the use of water hoses or mace against cell-confined inmates. *See, e.g., Bailey v. Turner*, 736 F.2d 963 (4th Cir. 1984).

Mailet, 619 F. 2d 196 (2nd. Cir. 1980), *cert. denied*, 449 U.S. 1016 (1982). As noted above, those cases hold that supervisory *inaction* may result in liability only upon proof of the supervisor's knowledge of a pattern and practice of constitutionally offensive conduct such that the failure to remedy that practice constitutes deliberate indifference to the injured party and led to the violation of those rights. The reasoning behind the holding is that such deliberate indifference amounts to implicit authorization of the illegal conduct thus satisfying the requirements of *Rizzo* and *Monell* that a nexus be shown between the misconduct and the adoption of a plan or policy authorizing such misconduct.

In *Estelle v. Gamble*, 429 U.S. 97 (1976) this Court stated that prison officials could be held liable for failing to provide adequate medical care to an inmate upon a showing that their deliberate indifference to the inmate's serious medical needs resulted in the wanton infliction of unnecessary pain. However, this Court has not gone as far as some circuits have in holding that deliberate indifference to a past history of unconstitutional conduct can result in liability for future injuries to others. In fact *Rizzo* seems to imply that supervisory inaction even in the face of a statistical pattern of misconduct cannot result in liability under 42 USC § 1983.[2] However, to the extent that this Court might adopt such a theory consistent with *Rizzo* and *Monell* it is

---

[2]Respondent's attempts to distinguish *Rizzo* on the basis that it was decided in the context of a claim for injunctive relief are flatly contradicted by the very cases he cites. For example, *Hays v. Jefferson Country*, *supra*, specifically held that the reasoning of *Rizzo* applies in cases seeking monetary relief.

clear that liability must be grounded on proof that (1) the supervisory officials were or should have been aware of a past pattern and practice of misconduct, (2) that the officials failed to take any steps to remedy the misconduct such that their deliberate indifference amounted to authorization of the misconduct and (3) that plaintiff's injuries were the result of that indifference.

In this case the evidence failed, as a matter of law, to establish any of those elements of proof. First, even if it is assumed (as the Fourt Circuit did) that there was sufficient evidence to show Petitioners' awareness of the nine prior incidents of the use of water hoses and mace against cell-confined inmates offered by Respondent to show a pattern of misconduct[3], there was no evidence to show that Petitioners should have been aware that the force employed in those incidents was excessive. None had been litigated and, as noted above, the law was (as still is) that there is no *per se* prohibition on the use of water hoses and mace against cell-confined inmates. Further, injury was alleged in only two of the nine incidents and the injuries alleged were not of a serious or permanent nature. Second, Respondent himself introduced policies governing the use of force in general and water hoses in particular. (See A-27 through A-38 of the Petition for Writ of Certiorari.) The post hoc opinion that these policies were inadequate does not equate to "deliberate indifference." *Compare Estelle v. Gamble, supra.* Third, and perhaps most important, the nine prior cases dealt *only* with the use of water hoses and mace. Respondent's most serious injuries resulted from several blows to the head with riot batons. Thus, even if Petitioners' failure to adopt more specific guidelines on the use of water hoses and mace could be characterized as deliberate indifference, there was no

[3]Only Garrison was shown to have actual knowledge of these incidents. Edwards denied such knowledge. Plaintiff's expert testified only that Reed *should have known* of the incidents since he was Secretary of Correction.

affirmative link between that failure and the guards' misconduct or Respondent's injuries.

The Fourth Circuit's decision, although paying lip service to the deliberate indifference standard, failed to correctly apply the elements of proof essential to establishing the nexus between policy and misconduct required by *Rizzo*, *Monell* and cases in the other circuits. The result was to hold the Secretary of Correction, the Director of Prisons and the Warden of the State's largest prison answerable for punitive and compensatory damages without proof that they authorized or approved the misconduct of subordinates far below them in the chain of command.

As a final note, Respondent's argument that Petitioners failed to object to the jury instructions in this case misses the point that the evidence was insufficient as a matter of law to support a finding of supervisory liability under any appropriate legal theory. It also ignores the fact that the decision of the Fourth Circuit establishes legal precedent in conflict with the holdings of this Court in *Rizzo* and *Monell*, and of the other circuits.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

This 25th day of February, 1985.

LACY H. THORNBURG
ATTORNEY GENERAL

Jacob L. Safron
Special Deputy Attorney General

Lucien Capone, III
Assistant Attorney General
N.C. Department of Justice
P.O. Box 629
Raleigh, North Carolina 27602
Tele: (919) 733-7188
ATTORNEYS FOR PETITIONERS

CERTIFICATE OF SERVICE

This is to certify that three (3) true and correct copies of the Petitioners' Reply Brief has been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

Charles T.L. Anderson
N.C. Prisoner Legal Services
6th Floor Capital Club Building
16 West Martin Street
Raleigh, North Carolina 27611

This the 25th day of February, 1985.

LACY H. THORNBURG
ATTORNEY GENERAL

Jacob L. Safron
Special Deputy Attorney General

Lucien Capone, III
Assistant Attorney General
N.C. Department of Justice
Raleigh, North Carolina 27602
Tel: (919) 733-7188
ATTORNEYS FOR PETITIONERS